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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

GREGORY PIERCE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

THOMAS D. YANNUCCI
(Counsel of Record)
JOHN M. WALKER
RONALD R. ROSS
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioner Gregory Pierce

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QUESTIONS PRESENTED

1. Were Petitioner's statutory and constitutional rights violated when, notwithstanding the express provision in 28 U.S.C. § 1826(a) that a citizen may decline to testify for "just cause," Petitioner was denied a meaningful opportunity to present his grounds for declining to testify before a District of Columbia grand jury?

2. Did the Court of Appeals err in refusing to return the Petitioner to the *status quo ante* when more than 30 days elapsed before Petitioner's appeal was resolved, as required by the express terms of 28 U.S.C. § 1826(b)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
A. The Facts At Issue	4
B. The Decisions By The Court Of Appeals	7
REASONS FOR GRANTING THE WRIT	8
I. AN ALLEGED CIVIL CONTEMNOR'S RIGHT UNDER 28 U.S.C. § 1826(a) TO DECLINE TO COMPLY WITH A COURT ORDER FOR "JUST CAUSE" REQUIRES A FULL AND EFFECTIVE HEARING BOTH TO DETERMINE IF "JUST CAUSE" EXISTS AND TO DETERMINE IF THERE ARE MITIGATING OR EXTENUATING CIRCUMSTANCES	9
II. THE COURT OF APPEALS' JULY 8, 1986 DECISION DENYING THE PETITIONER CREDIT FOR TIME SERVED BEYOND 30 DAYS WHILE HIS APPEAL WAS PENDING DIRECTLY CONFLICTS WITH THE RULINGS OF OTHER CIRCUITS AND RAISES A SUBSTANTIAL ISSUE AS TO THE PROPER INTERPRETATION OF 28 U.S.C. § 1826(b)	16
CONCLUSION	20

TABLE OF CONTENTS—Continued

APPENDIX	Page
Judgment of the D.C. Circuit (May 16, 1986)	A1
Opinion of the D.C. Circuit (May 16, 1986)	A3
Opinion of the D.C. Circuit (794 F.2d 749 (July 8, 1986))	A9
Order of the D.C. Circuit denying rehearing (August 6, 1986)	A15
Order of the D.C. Circuit denying rehearing *en banc* (August 6, 1986)	A16
Plea Agreement (December 9, 1985)	A17
Letter from Assistant United States Attorney John E. Stevens to Charles B. Molster, III, Esq. (December 11, 1985)	A20
Motion to Reconsider Order (March 3, 1986)	A22
Transcript of the hearing before the United States District Court for the District of Columbia (March 3, 1986)	A24
Transcript of the hearing before the United States District Court for the District of Columbia (March 6, 1986)	A30
Order of the United States District Court for the District of Columbia (March 10, 1986)	A45

TABLE OF AUTHORITIES

CASES: Page

Commissioner of Internal Revenue v. *Bilder*, 369 U.S. 499 (1962) 15
Cooke v. *United States*, 267 U.S. 517 (1925) 10, 12, 14
Fuller v. *Oregon*, 417 U.S. 40 (1974) 15
Harris v. *United States*, 382 U.S. 162 (1965) 10, 12, 14
In re Battaglia, 653 F.2d 419 (9th Cir. 1981) 9
In re Berry, 521 F.2d 179 (10th Cir.) (per curiam), *cert. denied*, 423 U.S. 1039 (1975) 17
In re Brummitt, 608 F.2d 640 (5th Cir. 1979), *cert. denied*, 447 U.S. 907 (1980) 13
In re Cueto, 443 F. Supp. 857 (S.D.N.Y. 1978) 12
In re Grand Jury Proceedings of August 1984, 757 F.2d 108 (7th Cir.), *cert. denied*, —— U.S. ——, 105 S. Ct. 2025 (1985) 17, 18
In re July 1979 Term Special Grand Jury, 656 F.2d 64 (4th Cir. 1981) 17
In re Kitchen, 706 F.2d 1266 (2d Cir. 1983) 2, 12, 15
In re Matter of Witness Before Special October 1981 Grand Jury, 722 F.2d 349 (7th Cir. 1983).. 17, 18
In re Oliver, 333 U.S. 257 (1948) 10, 12, 14
In re Rosahn, 671 F.2d 690 (2d Cir. 1982) 16, 17, 18
In re Sealed Case, 794 F.2d 749 (D.C. Cir. 1986).. 3
In re Weiss, 703 F.2d 653 (2d Cir. 1983) 2, 9
Laing v. *United States*, 423 U.S. 161 (1976) 15, 19
Linkletter v. *Walker*, 381 U.S. 618 (1965) 19
McElroy v. *United States*, 455 U.S. 642 (1982).... 15, 19
Melickian v. *United States*, 547 F.2d 416 (8th Cir.), *cert. denied*, 430 U.S. 986 (1977) 16, 17, 18
United States v. *Alter*, 482 F.2d 1016 (9th Cir. 1973) 11, 12, 15
United States v. *Bowler*, 585 F.2d 851 (7th Cir. 1978) 12
United States v. *Dinsio*, 468 F.2d 1392 (9th Cir. 1973) 11
United States v. *Donovan*, 429 U.S. 413 (1977).... 15
United States v. *Gravel*, 605 F.2d 750 (5th Cir. 1979) (per curiam) 13
United States v. *John Hancock Mut. Life Ins. Co.*, 364 U.S. 301 (1960) 19

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Powers*, 629 F.2d 619 (9th Cir. 1980)	9
United States v. *Ruzicka*, 329 U.S. 287 (1946)	15
United States v. *Standard Oil of California*, 332 U.S. 301 (1947)	15
Weinberger v. *Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609 (1973)	19
STATUTES:	
U.S. Constitution Amendment V	3
18 U.S.C. § 1029	4
28 U.S.C. § 1254(1)	3
28 U.S.C. § 1826	*passim*
Fed. R. Crim. P. 42(b)	10, 11
MISCELLANEOUS:	
Annotation, *Grand Jury Witness' Right to Hearing Before Summary Commitment For Contempt Under Recalcitrant Witness Statute (28 U.S.C. § 1826(a))*, 37 A.L.R. Fed. 875 (1978)	9
3 Corbin on Contracts (1960)	13
Note, *Coercive Contempt and the Federal Grand Jury*, 79 Colum. L. Rev. 735 (1979)	1, 12, 14, 15
R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice § 4.4 (6th ed. 1986)	19
C. Wright, 3 Federal Practice & Procedure: Criminal 2d § 715 (1982)	16

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Gregory Pierce respectfully requests that a writ of certiorari issue to review two separate decisions, entered on May 16, 1986 and July 8, 1986, by the United States Court of Appeals for the District of Columbia Circuit. Both decisions raise substantial issues pertaining to 28 U.S.C. § 1826, titled "Recalcitrant Witnesses," which permits an individual to be incarcerated for up to 18 months for civil contempt *if* he cannot demonstrate "just cause" for declining to testify when subpoenaed to do so.

Since this statute was promulgated in 1970, "there has been a dramatic increase in the use of coercive contempt" in the federal courts. Note, *Coercive Contempt and the Federal Grand Jury*, 79 Colum. L. Rev. 735, 735 (1979). Although Section 1826 was enacted to aid in the fight against organized crime,[1] it applies equally, if not more

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[1] Section 1826 was enacted by Congress as part of the Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922 (1970), *see*

so, to civil disobedients, members of religious sects and journalists, since these individuals frequently decline or resist government requests to testify on the ground that there is "just cause" to withhold such testimony. Accordingly, a definitive and informed analysis of Section 1826 is of growing importance to the ability of federal courts to balance properly the government's legitimate interest in gathering information with respect to suspected criminal activity and a citizen's right to decline to participate in such an investigation when legitimate grounds can be shown for doing so.

Two important issues related to judicial power under Section 1826 merit the Court's consideration here. First, may a court bar an accused contemnor from presenting an explanation of the "just cause" pursuant to Section 1826(a) which underlies his decision to decline to testify and, if it may do so, what grounds must support such a decision? Second, may a court decline to return a citizen to the *status quo ante* if his appeal is not resolved within 30 days, the express time limit for deciding appeals established by Section 1826(b)? Each of these issues is of obvious public importance because each bears directly on personal liberty and each has given rise to varying, if not sharply conflicting, interpretations of Section 1826 among different courts of appeals. This case thus provides the Court with a much-needed opportunity to resolve these conflicting interpretations and, at the same time, accord petitioner Gregory Pierce the protections to which he is entitled under Section 1826 and the Constitution.

OPINIONS BELOW

The May 16, 1986 unpublished memorandum opinion of the Court of Appeals appears at Appendix A3.

In re Weiss, 703 F.2d 653, 665 (2d Cir. 1983), and was intended to codify the common law of civil contempt. *See In re Kitchen*, 706 F.2d 1266, 1271 (2d Cir. 1983).

The July 8, 1986 memorandum opinion of the Court of Appeals, published at *In re Sealed Case*, 794 F.2d 749 (D.C. Cir. 1986), appears at Appendix A9.

The August 6, 1986 orders denying the Petitioner's petition for rehearing and suggestion for rehearing *en banc* appear at Appendix A15 and A16, respectively.

JURISDICTION

Jurisdiction of this Court arises under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

2. 28 U.S.C. § 1826, "Recalcitrant Witnesses," provides in relevant part:

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the Court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—
>
> (1) the court proceeding, or
>
> (2) the term of the grand jury, including extensions,
>
> before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

STATEMENT OF THE CASE

A. The Facts At Issue

Petitioner Gregory Pierce, a member of the religious organization known as the Original African Hebrew Israelite Nation of Jerusalem (the "Black Hebrew Nation") was arrested in July of 1985 and charged with fraudulent use of a credit card in violation of 18 U.S.C. § 1029. These charges, initially brought in the District of Columbia, were transferred to the Eastern District of Virginia, where Charles B. Moster, III was appointed by that court to serve as Mr. Pierce's counsel.

The Assistant United States Attorney in charge of the case, John Stevens, and Molster discussed the possibility of entering into a plea agreement. The parties in fact reached an oral agreement, and on December 5, 1985, the Court accepted Mr. Pierce's plea of guilty on one count of the indictment and dismissed the remaining counts. Shortly thereafter, a written plea agreement—drafted by the Assistant United States Attorney, Mr. Stevens—was signed by the parties and filed with the Eastern District of Virginia on December 9, 1985. (A17-19.) Mr. Pierce then began serving a one-year prison sentence in a federal prison in Minnesota.

Just two days after the plea agreement was filed, Stevens wrote a letter to Molster that "invit[ed]" Pierce both to meet with the United States Attorney and to possibly testify before a federal grand jury in the District of Columbia then investigating an alleged "organized

criminal element operating within the Black Hebrew sect." (A20-21.) After consultation with his attorney, Mr. Molster, Petitioner declined both invitations. Accordingly, on February 27, 1986 and on motion by the United States, Judge Aubrey Robinson of the United States District Court for the District of Columbia issued an order directing Mr. Pierce to testify and provide other information to the grand jury.

Pursuant to the subpoena, Pierce was brought from prison in Minnesota to the District of Columbia for the purpose of testifying. A new attorney, David Woll, was then appointed by the District Court to represent Mr. Pierce regarding the order to testify. Upon meeting with his client, Woll learned that Pierce believed that the government had agreed that it would not call him to testify in matters related to the government's on-going investigation of alleged criminal activity by members of the Black Hebrew Nation. (*See* A25.) Accordingly, Woll moved on March 3, 1986 for reconsideration of Judge Robinson's order compelling Pierce to testify. At the hearing on this motion, Woll explained to District Judge John H. Pratt that Pierce's refusal to testify was premised on Pierce's understanding that "he was *assured both by the Government and by his lawyer*" that the plea agreement "ended everything" and "that he would not have to testify as to anything." (A25; emphasis added.) Woll also noted that Mr. Molster, Pierce's court-appointed attorney in the Virginia proceeding, had been contacted and corroborated Pierce's interpretation and understanding of the plea agreement. (A26.)

Judge Pratt agreed that it was appropriate under the circumstances to hold a further hearing with Pierce present. As the Judge noted, if Pierce was "going to be the subject of a rule to show cause", then he "*certainly*" should be permitted "*to present his side of it.*" (A27; emphasis supplied.) Accordingly, Judge Pratt ordered a prompt hearing "so that Mr. Pierce can be here and this matter can be heard." (A27.)

That hearing, with Gregory Pierce, Mr. Stevens, Mr. Woll and Mr. Molster in attendance, took place before Judge Pratt on March 6, 1986. When Woll indicated that he wanted to present testimony concerning the plea agreement either through a proffer or by testimony from Molster, the court stated: "[c]all him as a witness." (A32.) However, as soon as Molster began to testify regarding the disputed plea agreement, the government strongly objected on the ground that only the written terms of the plea agreement were relevant. (A34-40.) The District Court sustained this and similar objections, and, accordingly, it precluded *all* testimony relating to (1) a prior draft of the plea agreement; (2) the parties' understanding of the plea agreement based on their negotiations; and (3) Mr. Molster's understanding of the provision in the executed plea agreement addressing whether Mr. Pierce would be called to testify in other proceedings. (A34-40.) The District Court also failed to question Mr. Pierce concerning the information conveyed to him by Molster regarding the matters covered by the plea agreement; instead, the court inquired only into whether Pierce would continue to decline to testify. (A42.)

In short, despite Judge Pratt's earlier statements that Mr. Pierce should "certainly" be permitted to "present his side of it" (A27), Mr. Pierce never was allowed to offer testimony, including corroborative third-party testimony from Mr. Molster, to demonstrate that he reasonably believed that the plea agreement constituted "just cause" for declining to testify. Rather, Judge Pratt concluded that Mr. Pierce should be held in contempt because, in the court's view, the plea agreement did not excuse him from testifying (A42-43), and further ordered that the execution of Mr. Pierce's criminal sentence would be held in abeyance as long as he remained in contempt by declining to testify. (A43.)

B. The Decisions By The Court Of Appeals

Mr. Woll promptly filed a notice of appeal on March 12, 1986. Undersigned counsel were appointed by the Court of Appeals to represent Mr. Pierce on March 25, 1986, and on April 1, 1986, Petitioner moved for expedited hearing and briefing, which was granted. On May 16—65 days after the notice of appeal was filed—a panel of the Court of Appeals for the District of Columbia Circuit affirmed the judgment of the district court. (A1-2.)

In its memorandum opinion, the Court of Appeals concluded that the plea agreement, standing alone, did not support Mr. Pierce's decision not to testify. The court thus simply upheld Judge Pratt's ruling that Mr. Molster's and Mr. Pierce's understanding of the agreement was inadmissible (A5-6), rather than examine the adequacy of the hearing or whether Pierce was given a meaningful opportunity to explain his position. Indeed, the only language arguably responsive to Petitioner's Section 1826 claim is found in the Court of Appeals' observations that it "need not and do[es] not opine" whether even the truncated hearing below was "required under the circumstances at hand" (A5 n.4), and that any argument that the plea agreement was "agreed to only after misrepresentations, false assurances of other improper conduct" was "hypothetical." (A8 n.7.)

The Court of Appeals did expressly reserve a second question in its opinion: whether Mr. Pierce was entitled, pursuant to Section 1826(b), to a "credit" against his unrelated criminal sentence from the thirty-first day following notice of appeal until the day the D.C. Circuit decided it, May 16. Mr. Pierce raised this issue in his brief as appellant and in argument, but the government failed to address it. Accordingly, the Court of Appeals directed both parties to submit supplemental briefs with respect to this separate issue. (A8.)

The same panel then also resolved this issue against Petitioner by opinion issued on July 8, 1986. (A9.)

It did so by expressly declining to follow the uncontradicted precedent of at least two other courts of appeals which requires release of a contemnor pending resolution of his appeal if it is not decided within the thirty days. (A13-14.) Instead, in what the Court of Appeals itself characterized as an "obviously atypical" remedy, it determined that Mr. Pierce—notwithstanding his status as an inmate at the time he was found in contempt—should have sought "bail . . . so that he could thereby resume serving his criminal sentence" after the thirty-day period had elapsed. (A11 n.2.)

As of this time, Mr. Pierce remains confined for civil contempt in a federal correctional facility located in Petersburg, Virginia, with his one-year crimial sentence held in abeyance.

REASONS FOR GRANTING THE WRIT

Enacted in 1970 as a codification of the civil contempt power of the judiciary, 28 U.S.C. § 1826(a) empowers federal courts to imprison an individual who disobeys a court order "to testify or provide other information" only if the individual cannot show "just cause" for declining to comply. Although it is well-settled that an alleged contemnor is entitled to a hearing to demonstrate "just cause," here the District Court and the Court of Appeals used common law principles of contract interpretation to deny Petitioner any effective hearing on his grounds for declining to testify.

When an individual's personal liberty is at risk, principles of contract interpretation—while arguably relevant to a court's ultimate result—should not bar an individual from fully explaining his position either for the purpose of establishing "just cause" or for the purpose of mitigating any punishment assessed. Such a result violates both the manifest meaning of the opportunity to show "just cause" and the alleged contemnor's right to due process of

law, and does not serve any substantial governmental purpose.

Moreover, Section 1826(b) specifies in relevant part that "[a]ny appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal." The Court of Appeals did not decide Mr. Pierce's appeal until 65 days after it was filed, and yet held in its July 8 opinion that Mr. Pierce was not entitled to a "credit" against his criminal sentence from the thirty-first day until the day the appeal was decided. This result is not only flatly contrary to the more reasoned rules of the Courts of Appeals for both the Second and the Eighth Circuits, which have held that an accused contemnor is entitled to release if his appeal is not heard within thirty days, but also interprets Section 1826(b) in a manner which renders the "thirty-day" rule nugatory.

I. AN ALLEGED CIVIL CONTEMNOR'S RIGHT UNDER 28 U.S.C. § 1826(a) TO DECLINE TO COMPLY WITH A COURT ORDER FOR "JUST CAUSE" REQUIRES A FULL AND EFFECTIVE HEARING BOTH TO DETERMINE IF "JUST CAUSE" EXISTS AND TO DETERMINE IF THERE ARE MITIGATING OR EXTENUATING CIRCUMSTANCES

It is settled that a finding of civil contempt under Section 1826 must be supported by "clear and convincing evidence." *In re Weiss*, 703 F.2d at 667. *See also In re Battaglia*, 653 F.2d 419, 422 (9th Cir. 1981); *United States* v. *Powers*, 629 F.2d 619, 626 n.6 (9th Cir. 1980). In responding to such an allegation, the statute provides that an individual may show that he has "just cause" for declining to comply with the court order at issue. To demonstrate this "just cause," it is "well established that the [recalcitrant] witness is entitled to at least some opportunity to be heard . . . ." Annotation, *Grand Jury Witness' Right To Hearing Before Summary Commit-*

ment For Contempt Under Recalcitrant Witness Statute (28 U.S.C. § 1826(a)), 37 A.L.R. Fed. 875, 877 (1978) (collecting cases).

This settled right to a hearing is an outgrowth not only of the statute itself, but of due process principles recognized time and again by this Court in discussing criminal contempt. For example, in *In re Oliver*, 333 U.S. 257, 275 (1948), the Court observed that

> due process of law . . . requires that one charged with contempt of court be advised of the charges against him, *have a reasonable opportunity to meet them by way of defense or explanation*, have the right to be represented by counsel, *and have a chance to testify and call other witnesses in his behalf*, either by way of defense or explanation. (Emphasis supplied.)

Again in *Harris* v. *United States*, 382 U.S. 162, 166-67 (1965), this Court further explained that one's right to a hearing serves "important ends" because "extenuating circumstances may be present" in the case of contempt; that "[i]f justice is to be done, a sentencing judge should know all the facts;" and that "a hearing and only a hearing will elucidate all the facts and assure a fair administration of justice." *See also Cooke* v. *United States*, 267 U.S. 517, 537 (1925) (Taft, C.J.) (holding that an accused criminal contemnor must be afforded a hearing and right to present evidence "relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed").

Following this Court's analysis, several lower courts have recognized that many of the procedural safeguards available to alleged criminal contemnors[2] substantially

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[2] These safeguards are required by the Due Process Clause, and, in any event, are also incorporated in Federal Rule of Criminal Procedure 42(b), which provides in relevant part:

> A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state

apply also to alleged civil contemnors by virtue of the Due Process Clause and 28 U.S.C. § 1826(a).[3] For example, the United States Court of Appeals for the Ninth Circuit concluded in *United States* v. *Dinsio*, 468 F.2d 1392, 1394 (9th Cir. 1973):

> The Due Process Clause requires that the rudimentary concepts of fair play reflected in Rule 42(b) be applied to afford Dinsio a real opportunity to meet the just-cause criterion of Section 1826(a). . . . [Dinsio] is entitled to an uninhibited adversary hearing in which she can develop her proof that she has just cause to refuse the grand jury's demand.

The Ninth Circuit shortly thereafter expounded on this right to the "uninhibited adversary hearing" under Section 1826(a) in *United States* v. *Alter*, 482 F.2d 1016, 1024 (9th Cir. 1973). The court there remanded a civil contempt finding to the district court, observing that the hearing below was defective because it "was largely confined to the perfunctory reception of affidavits, a round of oral argument, and some offers for the record." 482 F.2d at 1024. This was not enough, as the court went on to hold:

> That 'uninhibited adversary hearing' recognized by *Harris* and most recently reaffirmed by *Dinsio* requires, *at the very least, that a witness be allowed to probe all nonfrivolous defenses to the contempt charge.* The constitutional guarantee of due process of law means more than a silhouette of justice; it requires that judicial determinations affecting the freedom of the individual be openly arrived at after

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the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. . . .

[3] *See* Annot., 37 A.L.R. Fed. at 877 ("a substantial number of cases hold that the procedural requirements of Rule 42(b) . . . are applicable to a contempt hearing under § 1826(a)").

> full, fair, and vigorous debate on both sides of all substantial issues.[4]

482 F.2d at 1024 (emphasis supplied). The holding in *Alter*, it has been observed, has since "been essentially adopted by a majority of the federal courts of appeals." Note, 79 Colum. L. Rev. at 746 (collecting cases).[5]

Moreover, even if an accused contemnor's claim of privilege—pursuant to a plea agreement or otherwise[6]—is ultimately rejected by a court, the need for an "uninhibited hearing" is still essential, since such a hearing may reveal extenuating circumstances favoring mitigation of the extent to which the contemnor should be punished.[7] *See Harris* v. *United States*, 382 U.S. at 166 (hearing to show, *inter alia*, "extenuating circumstances"); *In re Oliver*, 333 U.S. at 275 (hearing to present "defense or explanation"); *Cooke* v. *United States*, 267 U.S. at 537 (hearing to show, *inter alia*, "extenuation of the offense and in mitigation of the

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[4] There has been no contention by the government at any stage in these proceedings that Mr. Pierce has presented an insubstantial or frivolous argument.

[5] *See, e.g., In re Kitchen*, 706 F.2d at 1273 (noting adoption in Second Circuit of principles from *Alter* and reversing contempt conviction under Section 1826 because contemnor had been denied opportunity to testify on his own behalf and call witnesses).

[6] Indeed, the right to a "vigorous debate . . . of all substantial issues" through a hearing is particularly important where, as here, a plea agreement is involved, since prosecutors engaged in plea bargaining are held to the strictest standards of promise and performance. *See United States* v. *Bowler*, 585 F.2d 851, 854 (7th Cir. 1978) (holding that a "plea agreement is not an appropriate context for the Government to resort to a rigidly literal approach in the construction of language").

[7] *See In re Cueto*, 443 F. Supp. 857, 863 (S.D.N.Y. 1978) ("A district judge has wide latitude in a civil contempt situation in determining whether to order coercive incarceration at all, and if incarceration is deemed warranted, the length of incarceration imposed is within his sound discretion").

penalty to be imposed"). Accordingly, in *In re Brummitt*, 608 F.2d 640, 643 (5th Cir. 1979), *cert. denied*, 447 U.S. 907 (1980), the Fifth Circuit reversed a conviction under Section 1826 "[b]ecause the district court never allowed Brummitt to present his defenses" and remanded the case to give the defendant "an opportunity to raise any other matters, whether as defenses or in mitigation." Similarly, in *United States* v. *Gravel*, 605 F.2d 750, 752 (5th Cir. 1979) (per curiam), the court noted that testimony pertaining to duress was permissible because, even though not a cognizable defense to a civil contempt charge, it could prove mitigating circumstances.

Judge Pratt barred all testimony and evidence pertaining to Gregory Pierce's reasonable belief as to the matters covered by the plea agreement, holding that such testimony could not vary the "unambiguous" terms of the plea agreement.[8] (*See* A42-43). The consequence was

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[8] The plea agreement stated that the government agreed not to call Mr. Pierce as a witness in any of the "cases indicted" in the District of Columbia involving the Black Hebrew Nation. (A18.) Pierce contended that the term "cases indicted" includes cases already indicted and those that would be indicted in the future, and sought to introduce extrinsic evidence supporting that view. The government's contention was that this term unambiguously included only "cases" *already* "indicted." To be sure, Pierce and counsel continue to believe that, at a minimum, the phrase is ambiguous and thus Pierce's proffered testimony should have been admitted. Indeed, generally accepted canons of contract construction require that a court should always admit extrinsic evidence to determine the meaning of a contract. *See generally* 3 Corbin on Contracts § 536 (1960).

However, Petitioner does not, and need not, assert that this Court should review the otherwise colorable contract issues in this case to decide that Pierce was entitled to testify as to what he reasonably *believed* the agreement covered. Rather, Petitioner relies here, as he also did below, on his right to an effective hearing under Section 1826(a) as an alternative and independent basis for overturning the decisions below to exclude testimony from Pierce and Molster.

that Pierce, far from receiving an "uninhibited adversary hearing," was accorded an empty formalism—a mere "silhouette of justice"—which essentially constituted no hearing at all. Indeed, under the approach adopted below, a court is singularly unable to gather and then weigh all the facts not only for purposes of determining if there is "just cause" or a defense for declining to testify, but also for the required purpose of determining whether to temper a finding of contempt in the light of "extenuating circumstances."

Similarly, the Court of Appeals necessarily held in affirming this conclusion that principles of contract interpretation override an accused contemnor's statutory and due process right—recognized by this Court in *Oliver*, *Harris* and *Cooke* and in civil contempt proceedings by several lower courts—to testify and present evidence for the purpose of defense or mitigation. Yet, even the Court of Appeals' opinion implicitly recognizes the problem with such an approach. The court observed that "we are not faced, by virtue of the insufficient offer of proof to this effect, with the situation where clear contract language was agreed to only after misrepresentations, false assurances or other improper conduct by the Government." (A8 n.7.) However, the *reason* no evidence was available pertaining to the issue of "misrepresentations" or "false assurances" by the government was because Judge Pratt *barred* evidence regarding Mr. Pierce's understanding of the plea agreement and, thus, of the representations and assurances on which that understanding was based. (*See* A34-40.)

In sum, Petitioner should have been afforded a meaningful opportunity to explain why he declined to testify, and the decision by Court of Appeals is plainly at odds with the prevailing view which provides for a much broader hearing than that accorded Gregory Pierce.[9]

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[9] "The 'coercion' in coercive contempt as currently administered takes the form of deprivation of the contemnor's liberty. While

Given the Court of Appeals' divergence from settled principles in this area,[10] the importance of the issues involved,[11] and the fact that the statute in question is of increased, not diminished, vitality,[12] it is appropriate to issue a writ of certiorari to review the Court of Appeals' May 16, 1986 judgment.

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incarcerated, the restraints on his personal autonomy may be as total as those of any other prisoner. In a society that places a high value on individual freedom, such restraints should not be imposed unless warranted by weighty public or governmental interests." Note, 79 Colum. L. Rev. at 758.

[10] The Court of Appeals' decision in this case is a clear departure from decisions by the Ninth (*Alter*) and Second (*Kitchen*) Circuits as well as from decisions by other courts. (*See* pp. 11-12, *supra*.) Accordingly, certiorari is appropriate for this reason alone. *See McElroy* v. *United States*, 455 U.S. 642, 643 (1982) (conflict among the circuits on issue of federal statutory construction); *Commissioner of Internal Revenue* v. *Bilder*, 369 U.S. 499, 501 (1962) (conflict between Tax Court and Second Circuit).

[11] It is also well established that the grant of certiorari is appropriate to resolve important questions of federal statutory and constitutional law. *See, e.g., United States* v. *Donovan*, 429 U.S. 419, 422 (1977) (certiorari granted to resolve issues "concern[ing] the construction of a major federal statute"); *Fuller* v. *Oregon*, 417 U.S. 40, 42 (1974) (important question of whether a state may condition probation on the repayment of costs incurred by the state in providing a defendant with effective assistance of counsel); *United States* v. *Ruzicka*, 329 U.S. 287, 288 (1946) (questions of importance in the administration of a federal statute). The possibility—and here, the reality—of confinement under Section 1826 necessarily renders issues arising under that statute important and worthy of careful analysis. *See* note 9 *supra*.

[12] Another key consideration in assessing the importance of the issue presented is the number of pending and future cases likely to turn on the outcome of a decision by the Court. *See Laing* v. *United States*, 423 U.S. 161, 167 (1976) (seventy other cases in the federal courts dependent upon resolution of question presented); *United States* v. *Standard Oil of California*, 332 U.S. 301, 302 n.2 (1947). As noted (p. 1, *supra*), cases under Section 1826 are occurring with increasing frequency and thus certiorari is particularly appropriate here.

II. THE COURT OF APPEALS' JULY 8, 1986 DECISION DENYING THE PETITIONER CREDIT FOR TIME SERVED BEYOND 30 DAYS WHILE HIS APPEAL WAS PENDING DIRECTLY CONFLICTS WITH THE RULINGS OF OTHER CIRCUITS AND RAISES A SUBSTANTIAL ISSUE AS TO THE PROPER INTERPRETATION OF 28 U.S.C. § 1826(b)

The Court of Appeals' July 8, 1986 opinion regarding the "thirty-day rule" of 28 U.S.C. § 1826(b) is in direct conflict with the positions of other federal courts of appeals and raises a substantial question of statutory interpretation that bears directly on an accused contemnor's freedom. The Court should issue a writ of certiorari to resolve this conflict.

Section 1826(b) provides in its first sentence that bail pending appeal shall not be permitted for an accused contemnor if the appeal appears to be "frivolous or taken for delay," but goes on to provide in the second sentence that "[a]*ny appeal* from an order of confinement under [the statute] shall be disposed of as soon as practicable, *but not later than thirty days* from the filing of such appeal." (Emphasis supplied.) On its face the statute thus contemplates the swift resolution of *all* appeals from orders of confinement within thirty days, whether or not a court believes them to be "frivolous."

As one leading authority has observed, however, "[t]he circuits vary widely on how, if at all, to enforce this limitation." C. Wright, 3 Federal Practice & Procedure: Criminal 2d § 715 (1982) at 870 n.10. The dominant view, supported by both the Second and Eighth Circuits, expressly holds that the statute requires release of the accused contemnor pending disposition of his appeal if the appeal is not decided within thirty days. The Eighth Circuit explained in first reaching this conclusion in *Melickian* v. *United States*, 547 F.2d 416, 419 (8th Cir.), *cert. denied*, 430 U.S. 986 (1977)—in language adopted by the Second Circuit in *In re Rosahn*,

671 F.2d 690, 694 (2d Cir. 1982)—that under this result "[t]he policy of the statute is upheld in that the contemnor is released until his appeal is decided" and yet "the coercive pressure of the contempt order is not completely lost . . . because the threat and actuality of reincarceration still loom on the horizon." [13]

A second view, more severe than that endorsed in *Melickian*, has been adopted by the Tenth Circuit. There, the Court held in *In re Berry*, 521 F.2d 179, 181 (10th Cir.) (per curiam), *cert. denied*, 423 U.S. 1039 (1975), that the thirty-day limit is jurisdictional, and that the Court of Appeals is divested of all power to review a contempt order if not heard within thirty days.[14]

In its July 8, 1986 opinion here, the Court of Appeals became the first and (to date) only court to expressly reject the *Melickian* and *Rosahn* rule,[15] invoking instead what it termed an "obviously atypical" remedy based on an entirely different interpretation of the statute. (A11 n.2.) In contrast to the finding of the Second and Eighth Circuits regarding the "policy of the statute" and notwithstanding its express terms, the court first concluded

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[13] Two other Courts of Appeals have since suggested that they agree with this result. *See In re Matter of Witness Before Special October 1981 Grand Jury*, 722 F.2d 349, 353 (7th Cir. 1983) (citing *Rosahn*); *In re July 1979 Term Special Grand Jury*, 656 F.2d 64, 66 (4th Cir. 1981) (citing *Melickian*).

[14] This interpretation has not been embraced by any other court of appeals, but it has been expressly rejected by some. *See, e.g., In re Grand Jury Proceedings of August 1984*, 757 F.2d 108, 110-12 n.1 (7th Cir.), *cert. denied*, —— U.S. ——, 105 S. Ct. 2025 (1985).

[15] It is undeniable that the Court of Appeals' decision results in a "split among the circuits" since the court stated that "[w]e are aware that some courts have concluded that when an appeal is not resolved within the thirty-day period, a contemnor whose request for bail was properly denied . . . should nonetheless be released pending [disposition] of the appeal . . . . We decline . . . to follow [this] line of authority . . . ." (A13-14.)

that Congress would not have wanted the thirty-day time limit to operate as a cap on time that may be served by a contemnor." (A13.) Pursuant to this reading of the legislative history of Section 1826(b), the court concluded that Gregory Pierce was not entitled to a "credit" for time served beyond thirty days and that, instead, Mr. Pierce—or any accused contemnor also incarcerated on an unrelated charge—must first obtain "bail" for the contempt charge "so he could thereby resume serving his criminal sentence." (A11 n.2.)[16]

The result reached by the D.C. Circuit—one of the three interpretations of Section 1826(b) now expressly adopted by four courts of appeals—is anomalous as well as unique.[17] Its admittedly "atypical" remedy asks that an already incarcerated contemnor seek bail solely so he can *remain* in jail, albeit on another charge. Moreover, the Court of Appeals' result renders nugatory the entire thirty-day proviso: under its analysis, if a court decides an appeal is not "frivolous or taken for delay," bail is *immediately* available and that remedy—but *only* that remedy—is available without regard for how long it takes the appeal to be decided. This result both voids by judicial fiat the express protection in the statute requiring

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[16] The Court of Appeals acknowledged that this case cannot be distinguished from *Melickian* and *Rosahn* on the grounds that Mr. Pierce was incarcerated on an unrelated conviction. (A13-14.) The issue is the same regardless of whether the alleged contemnor is already incarcerated at the time of the contempt: whether he must be returned to the *status quo ante* if his appeal is not decided within 30 days.

[17] The other courts of appeals seemingly have avoided directly confronting this issue by either deciding such appeals within the required thirty days or simply not discussing the limitation at all. *See In re Grand Jury Proceedings of August 1984*, 757 F.2d at 110-112 n.1 (extensive footnote discussing alternative approaches to thirty-day rule).

that "[a]ny appeal" be decided within thirty days[18] and ignores the fundamental canon of statutory construction that, if possible, language should not be given a meaning which renders it nugatory.[19]

It is difficult to envison a case which more clearly presents both a burgeoning conflict among the courts of appeals and an important question under an increasingly prominent federal statute. Individually, these factors counsel strongly in favor of review by this Court; jointly, they are even more compelling.[20] The deep conflict among the various courts of appeals, already noted in the past by experts and the courts (*supra* pp. 16-18), has been etched even more sharply by the court's opinion here; the four courts to interpret Section 1826(b) have now promulgated three distinctly different rules.

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[18] The Court of Appeals' opinion illogically links the availability of bail for those alleged contemnors asserting nonfrivolous appeals with the protection offered by the thirty-day rule, maintaining that "the thirty-day rule was apparently intended to protect contemnors with substantial grounds for appeal." (A13.) As interpreted by the Court, however, the thirty-day rule offers no protection at all to *any* accused contemnor, regardless of the substance of his appeal; it becomes mere surplusage to the right under the first sentence of Section 1826(a) to seek bail *at any time* pending disposition of a nonfrivolous appeal.

[19] *See, e.g., Weinberger* v. *Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 633 (1973) ("well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect"); *United States* v. *John Hancock Mut. Life Ins. Co.*, 364 U.S. 301, 308 (1960).

[20] "The Supreme Court *usually, but not necessarily* will grant certiorari where the decision of a federal court of appeals, as to which review is sought, is in direct conflict with a decision of another court of appeals on the same matter of *federal* law . . . ." R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice § 4.4 (6th Ed. 1986), at p. 197 (emphasis in original). *See, e.g., McElroy* v. *United States*, 455 U.S. at 643 (conflict among circuits on issue of federal statutory construction); *Laing* v. *United States*, 423 U.S. at 167; *Linkletter* v. *Walker*, 381 U.S. 618, 620 (1965) (certiorari granted "in order to settle what has become a most troublesome question in the administration of justice").

Moreover, the need for a definitive interpretation of Section 1826(b) is manifest, since the judiciary's civil contempt power increasingly is employed to enforce government interests. Nor should the balance struck by Section 1826 between the public interest in furthering testimony and an individual's right not to testify under certain circumstances vary depending on where that citizen resides. The Court of Appeals believed the issue of the proper interpretation of the thirty-day rule was sufficiently important to merit separate briefing; it is also sufficiently important, in Petitioner's view, to merit dispositive consideration and decision by this Court.

CONCLUSION

This case presents the Court with an opportunity to resolve conflicts among courts of appeals on two separate aspects of an important federal statute: the rights to which an alleged civil contemnor is entitled prior to imprisonment (Section 1826(a)) and the remedy available to him in the event the statutorily-prescribed thirty-day time limit for resolving his appeal is exceeded (Section 1826(b)). Thus, the Court should issue a writ of certiorari to review the decisions of May 16, 1986 and July 8, 1986 of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

THOMAS D. YANNUCCI
(Counsel of Record)
JOHN M. WALKER
RONALD R. ROSS
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioner
Gregory Pierce

September 24, 1986

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA COURT

September Term, 1985
Misc No. 86-66

No. 86-5161

IN RE: SEALED CASE

Appeal from the United States District Court
for the District of Columbia

[Filed May 16, 1986]

Before: SCALIA, STARR and BUCKLEY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was briefed and argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c). On consideration thereof, and for the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed. It is

FURTHER ORDERED, by the Court, that the appellant's motion to lodge the affidavit of Charles B. Molster, III, Esq., is hereby granted. It is

FURTHER ORDERED, by the Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

MEMORANDUM

This expedited appeal is taken from an order of the District Court holding appellant in civil contempt for refusing to testify before a federal grand jury in the District of Columbia and ordering him incarcerated for the life of the grand jury or until he agrees to testify.[1] Appellant's contention on appeal is that the subpoena mandating his testimony violated the terms of a plea agreement which he entered into in the Eastern District of Virginia in December 1985. Under that agreement, appellant pled guilty to one count of a seven-count indictment charging him with fraudulently purchasing airline tickets with a counterfeit credit card at Washington National Airport in June 1985. In return, the Government in that agreement obligated itself, among other things, as follows:

> The government will not call [appellant] as a witness in any of the cases indicted in the District of Columbia involving other members of the alleged criminal organization operating within the [named] sect . . . .

Following an evidentiary hearing with respect to the circumstances surrounding the execution of the plea agreement, the District Court concluded that the "plea agreement . . . plainly does not bar the government from calling [appellant] to the Grand Jury to investigate matters not already indicted in the District of Columbia." Order of March 10, 1986.

Appellant vigorously contests that conclusion and asserts (1) that the operative language of the plea agreement is infected with ambiguity, thereby warranting the

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[1] Counsel for appellant, Thomas D. Yannucci, was appointed by this court for purposes of this appeal. (Another attorney served as appointed counsel in the District Court.) Mr. Yannucci has performed ably and admirably, consistent with the highest traditions of the profession.

admission of extrinsic evidence to illuminate the parties' actual intent; and (2) that appellant's own understanding, as buttressed by his court-appointed counsel's affidavit lodged with this court, was that his plea agreement terminated entirely his obligations to cooperate with the Government in any manner in its ongoing investigations and prosecutions of members of the sect, including grand jury proceedings.[2]

Upon analysis, we agree fully with the District Court's conclusion and affirm its judgment. The plea agreement simply does not admit of the ambiguity which appellant would have us divine. The Government obligated itself not to call appellant as a witness "in any of the cases indicted in the District of Columbia." The clear and unmistakable meaning of this language is that appellant was being excused from testimony in "cases indicted" in a specific jurisdiction, not from grand jury investigations in that jurisdiction. An investigation by a grand jury is simply not encompassed, as the experienced District Court judge rightly concluded, by the words, "the cases indicted." [3]

That clear interpretation is buttressed by the proceeding before the sentencing judge in the Eastern District of Virginia. In the course of that proceeding, the prosecutor represented to the court as follows:

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[2] The Government argues that any such agreement would be violative of public policy. At oral argument, counsel for the United States narrowed its broad proposed principle by suggesting that a narrowly crafted agreement with respect to a specific grand jury investigation might survive the public policy bar. By virtue of our disposition of this case, however, we need not and do not venture into these uncharted and difficult waters.

[3] Appellant makes much of the point that "cases" are not "indicted" and that only "individuals" are indicted. But the three operative words taken together, "the cases indicted," cannot under any reasonable stretch of ordinary English be interpreted to include pre-indictment grand jury investigations.

> For the record, I will state that my agreement with the defense was that though he has no legal right to refuse to testify, the Government does not plan to call him to testify in the cases now indicted in Washington, D.C. We do not plan to call him as a witness for the Government. I believe that that will correspond to his understanding that was reached.

The District Judge then and there engaged appellant in the following colloquy:

> THE COURT: All right, Is that correct . . . ?
>
> [APPELLANT]: Yes.

Appellant does not quarrel in the slightest with the accuracy of the foregoing excerpts; instead, he takes the Government severely to task for employing extrinsic evidence to shed light on what it argues to be a crystal clear provision of the plea agreement, when it steadfastly objected to appellant's efforts below to adduce extrinsic evidence with respect to the parties' understanding of the agreement. Based upon our review of the proceedings below, however, we cannot agree with the more pertinent point that the District Court declined to consider extrinsic evidence in violation of what appellant deems to be controlling principles of contract law. Quite the contrary, the entire purpose of the evidentiary hearing conducted by the District Court was to examine the facts and circumstances leading up to and surrounding the plea agreement.[4] At that hearing, appellant's appointed trial counsel (from the Virginia federal district court proceedings) was called to the stand and testified concerning the background of the plea agreement. What the District Court declined to permit, and in our view properly so, were specific questions expressly aimed at

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[4] We need not and do not opine on whether such a hearing was indeed required under the circumstances at hand.

eliciting the attorney's own subjective understanding of what the plea agreement meant. One party's subjective understanding, whatever it might be, cannot override the unambiguous terms of an agreement, especially one not of Byzantine complexity but which to the contrary is written in plain English and covering only two and one-half pages.

We are fortified in our conclusion by the following points. First, in the sentencing hearing before the Virginia federal district court, the federal prosecutor made specific mention of appellant's refusal to cooperate in the District of Columbia grand jury proceeding.[5] Not one word was interposed by appellant or his trial counsel that the former's failure to cooperate was justified by the terms of the plea agreement. Silence on such a critical issue at such a critical juncture is odd in the extreme. Second, the lodged affidavit of appellant's trial counsel fails to surmount the considerable barriers erected both by the language of the plea agreement itself and by the events in the courtroom of the Eastern District of Vir-

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[5] Appellant seeks to make much of the fact that the federal prosecutor initially "invited" him by letter to testify before the grand jury in Washington, only thereafter repairing to the grand jury's subpoena power. This argument is without merit. In the first place, the parties at that juncture were in a cooperative mode, as reflected by the plea agreement itself which had so recently been struck in the Eastern District of Virginia; but more directly to the point, nothing in the letter suggests the slightest doubt as to the prosecutorial power to demand appellant's appearance. Indeed, that appellant's cooperation was expected and that its wanting would occasion some direct cost being imposed upon him was clearly signaled by the prosecutor's threat, expressly set forth in the letter of invitation, to bring any failure to cooperate to the attention of the sentencing judge. Such a threat would be highly curious if the prosecutor was of the view that appellant enjoyed a contractual agreement to be exempted from any such proceedings, since such an agreement would obviously provide a ready and sufficient response to the charge of non-cooperation.

ginia.[6] Although Mr. Molster's affidavit sets forth his belief as to the inconsistency of the course of events here with the contractual rights which his client putatively enjoyed, the specific factual averments in the affidavit are clearly wanting. The words "prosecution" and "prosecutions" are relied upon throughout the portions of the affidavit describing Mr. Molster's understanding of the coverage of the prosecutor's promise not to call appellant as a witness. In particular, Mr. Molster declared as follows:

> I understood [the prosecutor's representations] to mean that [appellant] would not be compelled to provide either incriminating or excuplatory information in connection with the prosecution of other members of the [sect]. I conveyed to [appellant] that the plea agreement would result in terminating his dealings with [federal prosecutors] regarding the prosecution of members of the [sect].

Without belaboring the obvious, "prosecutions" do not begin until an indictment has issued. The wording, then, of Mr. Molster's own affidavit is consistent with the plain language of the agreement itself and with the colloquy in federal district court in Virginia.[7]

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[6] As is evident from the discussion in the text, we have today granted appellant's motion to lodge the affidavit and have fully considered it in our disposition of this appeal.

[7] At oral argument, counsel for appellant indicated that, if any shortcoming were found with Mr. Molster's affidavit, the affidavit could be supplemented. We think that is a singularly inappropriate course under the circumstances here. The appeal has been expedited, the case has been fully briefed, it has been ably and thoroughly argued in open court, and with the seriousness of the issues abundantly clear to all, a thorough affidavit from appellant's trial counsel going to the very issue at hand has been furnished for our benefit. Given these elaborate preparations in an elaborate judicial process, the time for decision is now.

Appellant also argues that he had "just cause" within the meaning of 28 U.S.C. § 1826 to refuse to testify before the grand jury.

We reserve the question whether and to what extent the time served by appellant since the expiration of thirty days provided by statute for resolution of any appeal in such matters should be credited to his sentence entered pursuant to his conviction in the Eastern District of Virginia. By separate order entered this day, we are directing the parties to file supplemental briefs with respect to that question.

Affirmed.

That argument, however, turns in this case on whether he enjoyed the prerogative by virtue of the plea agreement to decline to testify before the grand jury. As to that, we find ourselves, for the reasons already stated, in accord with the District Judge's conclusion. Moreover, we are not faced, by virtue of the insufficient offer of proof to this effect, with the situation where clear contract language was agreed to only after misrepresentations, false assurances or other improper conduct by the Government. We obviously have no occasion to address that sort of hypothetical situation.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 86-5161

IN RE SEALED CASE

Argued May 15, 1986

Decided July 8, 1986

As Amended July 8, 1986

Appeal from the United States District Court
for the District of Columbia (Misc. No. 86-00066)

Before SCALIA, STARR and BUCKLEY, *Circuit Judges.*

Opinion PER CURIAM.

PER CURIAM:

This is an expedited appeal from a judgment of civil contempt in a grand jury proceeding. In an earlier order and memorandum opinion, filed May 16, 1986, we affirmed the District Court's judgment finding appellant in contempt for refusing, after a grant of immunity, to answer questions propounded to him in the grand jury proceeding. We expressly reserved, however, the question whether appellant should receive credit on his sentence on an unrelated criminal conviction for time spent in custody pursuant to the contempt order beyond the statutorily prescribed period of thirty days for deciding appeals in such cases. 28 U.S.C. § 1826(b) (1982). Following the court's order directing further submissions on

this question, the parties filed supplemental briefs addressing solely this issue. This opinion is likewise directed solely to the question of crediting.

Our role in resolving the issue before us is not to apply our own notions of equity in this particular case, but rather to determine whether Congress intended to create the remedy that appellant now seeks. *See, e.g., Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 91, 101 S.Ct. 1571, 1580, 67 L.Ed.2d 750 (1981); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 99 S.Ct. 2479, 2485, 61 L.Ed.2d 82 (1979). As in all matters of divining Congress' intent, the language of the statute provides the critical reference point for our analysis. *Id.*

Subsection (a) of 28 U.S.C. § 1826 sets forth the conditions under which recalcitrant witnesses may be held in confinement until they are willing to obey an order requiring testimony or other information in a pending judicial or grand jury proceeding. The next subsection, 1826(b), provides as follows:

> No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

By the plain terms of this provision, Congress intended that appeals from judgments of civil contempt imposed upon recalcitrant witnesses be decided within thirty days. But the statute is silent as to remedies for contemnors in the event an appeal is not resolved within the requisite period.[1] Congress knows full well how to craft a remedy

[1] Of course, a contemnor is not without any remedy; mandamus may be sought requiring the appellate court to decide the appeal

for violation of a statutory time limit on judicial proceedings. For example, an entire provision of the Speedy Trial Act is devoted to detailing sanctions for violation of criminal trial time limits. 18 U.S.C. § 3162 (1982); *see also id* at 3164(c) (1982). Under established canons of statutory construction, the fact that Congress enacted no analogous provisions in the statute at issue here is a powerful indication that Congress did not intend to provide a remedy for violation of the thirty-day rule. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 21, 100 S.Ct. 242, 247, 62 L.Ed.2d 146 (1979); *cf. Northwest Airline*, 451 U.S. at 91 & n.24, 101 S.Ct. at 1580 & n.24.

Moreover, Congress has expressly provided a remedy for the benefit of contemnors, "the class for whose *especial* benefit" the thirty-day rule was arguably enacted. *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26 (1975) (emphasis in original) (citation omitted). The liberal standard for granting bail ensures that no contemnor will languish in custody pending appeal except one who cannot show that the appeal is not frivolous or taken for delay.[2] In light of this express statutory remedy designed to protect contemnors, we find it "highly improbable that 'Congress absentmindedly forgot to mention' " another remedy for contemnors awaiting disposition of their appeal. *Transamerica*, 444 U.S. at 20, 100 S.Ct. at 247 (citation omitted).

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in timely fashion. *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980) (writ of mandamus traditionally used to compel an inferior court " 'to exercise its authority when it is its duty to do so.' ") (quoting *Will v. United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed.2d 305 (1967)).

[2] While the procedure is obviously atypical, we can see no reason why a contemnor, such as appellant, who is serving time for an unrelated criminal conviction may not seek bail (i.e., release from confinement for the civil contempt) under 28 U.S.C. § 1826(b), so he could thereby resume serving his criminal sentence.

Although mindful of the vagaries of employing legislative history as a mechanism for discerning the intent of the entire enacting body, we are nonetheless obliged to examine the genesis and development of this statutory provision for whatever light that inherently elusive process might shed. *See, e.g., Guardians Association v. Civil Service Commission*, 463 U.S. 582, 609, 103 S.Ct. 3221, 3236, 77 L.Ed.2d 866 (1983) (Powell, J., concurring in judgment); *Cannon v. University of Chicago*, 441 U.S. 677, 694, 99 S.Ct. 1946, 1956, 60 L.Ed.2d 560 (1979). Our resort to legislative history, however, only confirms our view that the express statutory remedy of bail is adequate to serve the legislative purpose undergirding section 1826(b). *See Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536, 541, 104 S.Ct. 831, 839, 841, 78 L.Ed.2d 645 (1984).

The original section of the Senate Bill that ultimately was enacted as 28 U.S.C. § 1826 denied bail to all contemnors during the pendency of their appeals. This regime prompted misgivings in the legislative process as to the fate of worthy contemnors languishing in the wake of an erroneous judgment of contempt. "In order to take into account the exceptional case where substantial grounds for appeal may exist," the Justice Department advanced the suggestion that a thirty-day limit on appellate consideration be added to the provision that denied bail in all cases. *Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary on S. 30, et al.*, 91st Cong., 1st Sess. at 371 (1969). The upshot was that the Senate voted to retain a stringent restriction on bail (i.e., bail was to be granted only when the contemnor established a "substantial possibility of reversal"), but at the same time embraced the thirty-day time constraint on appellate adjudication as suggested by the Justice Department. Under this modified approach, the thirty-day rule was understood as a means to mitigate "the fact that bail will usually be

denied by the trial court." *Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on S. 30, et al.*, 91st Cong., 2d Sess. at 163 (1970).

As events unfolded, however, the House declined to accept the Senate's strict standard with respect to granting bail. Rather, the House adopted a much more generous standard under which bail is granted to a contemnor unless the appeal is either "frivolous or taken for delay." The House version ultimately prevailed in conference and was enacted into law.

In our view, this history suggests that Congress would not have wanted the thirty-day time limit to operate as a cap on time that may be served by a contemnor, no matter how frivolous his appeal. As we have just seen, the thirty-day rule was apparently intended to protect contemnors with substantial grounds for appeal. Interpreting the thirty-day limit to contain the remedy appellant seeks would benefit only contemnors who do not qualify for bail, that is those who fail to demonstrate that their appeal is not frivolous or taken for delay.

We are aware that some courts have concluded that when an appeal is not resolved within the thirty-day period, a contemnor whose request for bail was properly denied under the frivolous-appeal standard should nonetheless be released pending deposition of the appeal. *See, e.g., Melickian v. United States*, 547 F.2d 416 (8th Cir.), *cert. denied*, 430 U.S. 986, 97 S.Ct. 1684, 52 L.Ed.2d 381 (1977).[3] We also agree with appellant's argument that

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[3] Some courts have stated or assumed that courts are deprived of jurisdiction once the thirty-day limit expires. *See, e.g., In re Berry*, 521 F.2d 179, 181 (10th Cir.) (*per curiam*), *cert. denied*, 423 U.S. 928, 96 S.Ct. 276, 46 L.Ed.2d 256 (1975). With all respect, we find no merit in this approach. Neither the language nor the legislative history of the statute dictates such a result. *See In re Grand Jury Proceedings*, 776 F.2d 1099, 1102 (2d Cir. 1985); *Melickian*, 547 F.2d at 419. Moreover, the availability of mandamus, *see supra* note 1, a less drastic remedy for noncompliance with the

these cases cannot properly be distinguished on the ground that they involved civil contemnors, who, unlike appellant, were not already incarcerated by virtue of a prior criminal conviction. *See In re Baird*, 668 F.2d 432, 433 n. 1 (8th Cir.), *cert. denied*, 456 U.S. 982, 102 S.Ct. 2255, 72 L.Ed.2d 860 (1982). The fact that a recalcitrant witness was already incarcerated when held in civil contempt provides no basis for treating that witness differently for purposes of the contempt action.

We decline, rather, to follow the *Melickian* line of authority for a more fundamental reason. In *Melickian*, the court justified its automatic-release rule on the ground that it "best reconciles the various interests bound up in the bail issue" and upholds "the policy of the statute." 547 F.2d at 419. But this approach, with all respect, misconceives the appropriate judicial mission. In our view, judicial creation of a statutory remedy based on such a policy analysis is foreclosed where, as here, the language, structure and legislative history of the statute provide no support for the proposition that Congress intended to create the remedy. *See, e.g., Northwest Airlines*, 451 U.S. at 94-95, 101 S.Ct. at 1582, *Redington*, 442 U.S. at 575-76, 99 S.Ct. at 2488-89. Our job is to interpret the statute that Congress has set before us, not to attempt to improve upon what Congress has done. *Redington*, 442 U.S. at 578, 99 S.Ct. at 2490.

The request for crediting is therefore denied.

So ordered.

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statutory deadline, and the weighty public interest in the orderly functioning of grand juries and the judicial process dissuades us from imputing to Congress a desire to render appellate courts powerless to enforce civil contempt orders after thirty days have elapsed. *Cf. Brock v. Pierce County*, —— U.S. ——, 106 S.Ct. 1834, 90 L.Ed.2d 248 (1986).

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

September Term, 1985

No. 86-5161

IN RE: SEALED CASE

[Filed Aug. 6, 1986]

Before: SCALIA, STARR and BUCKLEY, *Circuit Judges*

ORDER

Upon consideration of appellant's petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

BY THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1985

No. 86-5161

IN RE: SEALED CASE

[Filed Aug. 6, 1986]

Before: WALD, *Chief Judge*; ROBINSON, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA, STARR, SILBERMAN, BUCKLEY and WILLIAMS, *Circuit Judges*

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

BY THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Criminal No. 85-00208-A

UNITED STATES OF AMERICA

v.

GREGORY PIERCE a/k/a Shavat

PLEA AGREEMENT

The United States of America and the defendant, Gregory Pierce, have entered into a plea agreement disposing of the charges in the above-captioned case. The terms of the agreement are as follows:

MR. PIERCE'S OBLIGATIONS

1. He will plead guilty to Count VII of the indictment charging Use of Counterfeit Access Device in violation of 18 U.S.C. § 1029(a)(1), carrying a penalty of up to 15 years imprisonment or $50,000 fine or both;

2. He will state under oath that he knows of no exculpatory evidence with regard to his alleged co-conspirators.

GOVERNMENT'S OBLIGATIONS

1. All remaining counts of the indictment will be dismissed;

2. The United States of America will not pursue any other charges arising from the events of June 27-28, 1985, at Washington National Airport. This agreement in no way limits the use of evidence of the events in question in any other prosecution against Mr. Pierce;

3. The government will not call Mr. Pierce as a witness in any of the cases indicted in the District of Columbia involving other members of the alleged criminal organization operating within the "Black Hebrew" sect;

4. The government will take no position at the time of the plea regarding incarceration pending sentencing;

5. The government expressly reserves its right to allocute at the time of sentencing;

6. No other inducements or promises have been or will be offered to Mr. Pierce by the government.

GENERAL PROVISIONS

1. If Mr. Pierce should fail, in any way, to fulfill completely each and every one of his obligations in this agreement, the government will be released from its commitment to honor all of its obligations to him;

2. Nothing in this agreement shall be construed to protect Mr. Pierce in any way from prosecution for Perjury, False Declaration, or False Statement in violation of 18 U S.C. §§ 1621, 1623, or 1001, or Obstruction of Justice in violation of 18 U.S.C. § 702, should he commit any of those offenses in connection with this agreement;

3. This document constitutes the entire and complete agreement between the United States and Gregory Pierce and supercedes all prior understanding, if any, whether oral or written relating to the subject matter hereof, and cannot be modified other than in writing that is signed by both parties;

4. Gregory Pierce's signature in the space designated below signifies Mr. Pierce's full and voluntary acceptance of this agreement.

Respectfully submitted,

/s/ John E. Stevens
JOHN E. STEVENS
Special Assistant United States Attorney

Seen and agreed:

/s/ Charles B. Molster, III
CHARLES B. MOLSTER, III
Attorney for Gregory Pierce

/s/ Gregory Pierce
GREGORY PIERCE
Defendant

[SEAL]

U.S. DEPARTMENT OF JUSTICE

United States Attorney
District of Columbia

United States Courthouse, Room 2800
Constitution Avenue and 3rd Street, N.W.
Washington, D.C. 20001

December 11, 1985

Charles B. Molster, III, Esquire
2033 M Street, N.W.
Suite 404
Washington, D.C. 20036

Re: *United States* v. *Gregory Pierce*
Criminal No. 85-00208-A

Dear Mr. Molster:

We are continuing our investigation of illegal activities by an organized criminal element operating within the Black Hebrew sect. Our investigation to date gives us reason to believe that your client, Gregory Pierce, has knowledge of these activities which could assist us. Among other things, we believe that Mr. Pierce has knowledge of the trafficking in stolen and fraudulently obtained airline tickets engaged in by other members of the criminal enterprise, including those here in the District of Columbia.

We would like to interview Mr. Pierce about what he knows and possibly have him testify before the Grand Jury. Should there be any concern that Mr. Pierce's revelations might prove self-incriminating, we are prepared to grant formal use immunity to protect his Fifth Amendment privilege. *See* 18 U.S.C. 6002-6003; *Kastigar* v. *United States*, 406 U.S. 441, 462 (1972).

We emphasize that this is an invitation to cooperate, not a subpoena. If Mr. Pierce accepts our invitation and cooperates completely and truthfully, that cooperation will be made known to Judge Hilton at the time of sentencing for whatever mitigating effect he may choose to give it. Conversely, Mr. Pierce's refusal to cooperate will also be made known to the judge at time of sentencing. *Roberts* v. *United States*, 445 U.S. 552 (1980).

We require a reply by December 20, 1985. A lack of response will be interpreted as a refusal to cooperate. Should you have any question, please contact me at once at 272-9078.

Sincerely,

JOSEPH E. DIGENOVA
United States Attorney

by: /s/ John E. Stevens
JOHN E. STEVENS
Assistant United States Attorney

cc: Criminal Court Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 86-66

IN RE: GRAND JURY PROCEEDING
GREGORY PIERCE

[Filed March 3, 1985]

MOTION TO RECONSIDER ORDER

Defendant, Gregory Pierce, by and through his attorney, David Carey Woll, hereby respectfully requests this Honorable Court to reconsider its Order of February 27th, 1986, entered in the instant case and vacate same. As reasons therefore, defendant states:

1. Defendant, pursuant to his plea agreement entered with the United States Attorney, represented by John E. Stevens, Esquire, was assured by the United States Attorney's office that it would not require his testimony, either before a Grand Jury or petit jury, in reference to the Black Hebrew sect of which he was an alleged member. Furthermore, he was assured that with his guilty plea to the fraudulent use of a credit card to purchase airline tickets at National Airport, all matters in the Eastern District of Virginia and the District of Columbia were concluded.

2. The Government has caused defendant to be taken out of the facility in Duluth, Minnesota where he is serving his sentence, and returned to the District of Columbia

Jail, pending his appearance before a Grand Jury, causing Defendant great distress and discomfort.

3. It is Defendant's contention, borne out by the anticipated proffer of his attorney appointed to him in the Eastern District of Virginia, who negotiated the above plea agreement, that the Government has breached the plea agreement by demanding that he testify under immunity before the Grand Jury as to his knowledge of Black Hebrew matters.

4. It is Defendant's further contention that he is entitled to a hearing before the Court to present either a proffer or sworn testimony from his previous attorney as to the understanding of the parties before the Court is in a position to compel Defendant's testimony before a Grand Jury.

WHEREFORE, it is respectfully requested that the Court's Order earlier entered be vacated and that the matter be scheduled for a hearing before the Court.

Respectfully submitted,

/s/ David Carey Woll
DAVID CAREY WOLL
Attorney for Defendant
414 Hungerford Drive
Rockville, MD 20850
340-1822

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the preceding Motion was personally served on John E. Stevens, Esquire, United States Attorney's Office, this 3rd day of March 1986.

/s/ David Carey Woll
DAVID CAREY WOLL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Miscellaneous No. 86-66

IN RE: GREGORY PIERCE

Monday, March 3, 1986
Washington, D.C.

The above-entitled matter came on for hearing before The Honorable John H. Pratt, United States District Judge, at 2:30 p.m., on a grand jury matter.

Appearances:

On behalf of the Government:

JOHN STEVENS, ESQUIRE
Assistant U.S. Attorney.

On behalf of the Respondent:

DAVID WOLL, ESQUIRE.

* * * *

[2] PROCEEDINGS

THE DEPUTY CLERK: Miscellaneous 86-66, in regard to grand jury proceedings of Gregory Pierce.

THE COURT: I think the record should show that on the 27th of February last week, Judge Robinson issued an order requiring Gregory Pierce to appear before a grand jury and answer questions.

Is that correct, Mr. Stevens?

MR. STEVENS: That is correct, your Honor.

THE COURT: And I assume that was done and he stood mute—is that what happened?

MR. STEVENS: Your Honor, the witness in this case has not yet appeared before the grand jury. His attorney, Mr. Woll, informed me that he had two grounds for refusing to comply with the order; one disputing the legitimacy of the subpoena, and second, that he would not in any case testify regardless of the ruling.

On the basis of that representation, Mr. Woll and I asked the court to hear us today to avoid having to wait until Tuesday, since the witness had already stated what he would do. We figure he could state his refusal in open court to give the court basis for action, but unfortunately, he is not here today.

THE COURT: Mr. Woll has filed a motion to reconsider Judge Robinson's order and I think we ought to hear from you. Why doesn't this go before Judge Robinson, after all it's his [3] order?

MR. WOLL: Of course, I would like to have the defendant here for all proceedings. I mean, I have to be careful in that regard. He is not here, but I can inform the court that I was appointed, I think, late in the morning on the 27th and Mr. Stevens advised me as to what the situation was.

So I went down to the cell block and talked with this young man and he indicated that he—he told me, your Honor—well, apparently he pled guilty over in Alexandria federal court and he claims that there was a plea agreement where he would not have to testify concerning other Black Hebrew members and he stands by that. He feels that, therefore, he is not required to give any type of testimony because he was assured both by the Government and by his lawyer, a person by the name of Charles Molster who was appointed for the case over there. It was his understanding, in other words, that this ended everthing; that he would not have to testify as to anything.

When he told me that, I called his lawyer, Mr. Molster, who called me back later and indicated that he thought it was his understanding that all D. C. and Virginia matters were concluded. Although the plea agreement doesn't quite back him up to that extent.

THE COURT: You say Virginia matter?

MR. WOLL: Well, it was over in the Eastern District of Virginia, I believe.

[4] THE COURT: Well, you have seen the plea agreement?

MR. WOLL: Yes, your Honor.

THE COURT: It is not as crystal clear as it might be, but it—

MR. WOLL: No.

THE COURT: —but it does say the government will not call Mr. Pierce as a witness in any of the cases indicted in the District of Columbia involving other members of the alleged criminal organization.

Now I assume that what we have here is a grand jury proceeding that doesn't concern a case already indicted. It concerns matters that conceivably may be the subject of indictment somewhere down the road. Isn't that a correct interpretation?

MR. STEVENS: Precisely.

MR. WOLL: That would be my present interpretation. I am a little bit in a bind. I have to go on Molster's recollection. He would put both past and future to that, indicating "have been indicted and would be . . ." At any rate, just to finsh what I was saying, I think the Judge signed an order that afternoon. I was unaware of it. We didn't have a hearing. I thought we were going to have a hearing the next day before Judge Robinson. I thought to marshal my argument and get Mr. Molster down here and make a proffer to the court, but the order had already been signed. So I [5] thought the best thing to do is ask Judge Robinson to reconsider his order, or have him at least give me an opportunity to have a hearing and either present a proffer from Mr. Molster, or

testimony, or something, to try to get it straightened out.

THE COURT: I think Mr. Pierce, if he is going to be the subject of a rule to show cause, or something else, certainly he ought to be present to present his side of it. And since Judge Oberdorfer did not order a comeup, I think Oberdorfer being Motions Judge, the only thing is if we are going to keep this—and I assume we will—is to set this down some time later on in the week so that Mr. Pierce can be here and this matter can be heard.

Now at this present posture, I assume that we have two possible courses after hearing: one is that you can do something about your motion to reconsider the order; or two, we could issue a rule to show cause, or we could conceivably find him in contempt. I don't know. What do we do, Mr. Stevens?

MR. STEVENS: My suggestion, your Honor, would be to try to work out a procedure where we could handle all of this in one sitting because I think the issue is not very complicated. In fact, it is our position that hearing the testimony is not even appropriate in that the plea agreement must stand on its objective reading and the interpretation supplied by the court and not what the parties thought it [6] meant.

THE COURT: Of course, he hasn't even been sentenced, has he?

MR. STEVENS: Yes, your Honor. He has been sentenced.

MR. WOLL: Yes, he is serving a sentence.

MR. STEVENS: So he may have some cause for filing in Alexandria, if this court rules that he is not exempt from subpoena before the grand jury for some sort of vacation of the plea, if he elects to do it there. But here in the District of Columbia, we simply should schedule a hearing whereby the position could be presented and the court could then rule on whether the agreement substantiates the defendant's contention. At that point, it seems to me, the court could then inquire if he intends to comply with the motion to compel and

if he says, "yes," then I will be happy to schedule him post haste for the grand jury; take him immediately thereto. Or if he answers "no," that might constitute the requisite refusal that the court could take contempt action upon.

That would be my suggestion.

THE COURT: So we would avoid the matter of going through a rule to show cause. This would include the rule to show cause.

MR. STEVENS: It would, if the court requires—receives the motion in open court, that it would be.

THE COURT: Why don't you gentlemen pick out a date [7] and we could handle it at that time. I would think a couple of days hence?

MR. WOLL: I would prefer to have it in the morning, some time, you know, some morning this week.

THE COURT: We can have it in the morning.

MR. STEVENS: I will be available at the court's convenience, Your Honor.

THE COURT: How about it, Sharon?

THE DEPUTY CLERK: How about 10:30 on Wednesday?

MR. WOLL: That would be agreeable.

THE COURT: All right, see you 10:30 on Wednesday.

MR. WOLL: Your Honor would be in position to rule one way, or the other on the order?

THE COURT: That is precisely it, or at least, I hope so.

MR. WOLL: Thank you.

MR. STEVENS: Thank you, Your Honor.

THE COURT: Gentlemen.

(Whereupon, subject proceeding was concluded at 2:35 p.m.)

* * * *

CERTIFICATE OF REPORTER

The above and foregoing typewritten record is hereby certified by the undersigned as the official transcript of the proceedings in the above-captioned matter.

/s/ Vernell A. Marshall
VERNELL A. MARSHALL
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Miscellaneous No. 86-66

IN RE: GREGORY PIERCE

Thursday, March 6, 1986
Washington, D. C.

The above-entitled matter came on for hearing before the Honorable John H. Pratt, United States District Judge, at 10:45 a.m., on grand jury matter.

Appearances:

On behalf of the Government:

JOHN STEVENS, ESQUIRE
Assistant U.S. Attorney

On behalf of the Respondent:

DAVID WOLL, ESQUIRE.

* * * *

[1-B] CONTENTS

Witnesses	Direct	Cross
Charles B. Molster, III.	1-C	

EXHIBITS

Defendant's	For Identification	In Evidenec
No. 1—Copy of Plea Agreement	6	
No. 2—Correspondence	9	12

* * * *

[1-C] PROCEEDINGS

(10:45 A.M.)

THE DEPUTY CLERK: Miscellaneous No. 86-66, in re grand jury proceedings and witness Gregory Pierce; Mr. Stevens for the government, Mr. Woll for the witness.

THE COURT: Mr. Woll.

MR. WOLL: Yes, Your Honor.

Your Honor, as I indicated to you on Monday, it is our contention that my client, Mr. Pierce, is not required under the plea agreement to testify before a grand jury concerning activities of various members of the Black Hebrew Sect. I have evidence that I can either proffer, or your Honor can hear sworn testimony, if your Honor wishes, from his attorney who handled the matter, and of course is represented, in reference to the plea agreement, who can proffer testimony as to his understanding what his agreement was. That is Mr. Charles Holster, who is present in court and who is a member of the bar of this court.

THE COURT: Why don't you call Mr. Molster. Call him as a witness.

MR. WOLL: All right. Thank you, your Honor.

Whereupon,

CHARLES B. MOLSTER, III.

took the stand, and being duly sworn, was examined and testified as follows:

[2] DIRECT EXAMINATION

BY MR. WOLL:

Q Sir, would you please state your full name and spelling for the court reporter your last name?

A My name is Charles Bennett Molster, III. M-O-L-S-T-E-R.

Q You are an attorney, sir?

A Yes.

Q And you are admitted to practice in this court here, United States District Court for the District of Columbia?

A Yes. Yes, I am.

Q Now Mr. Molster, do you know Gregory Pierce?

A Yes, I do.

Q And how is it that you know Mr. Gregory Pierce?

A I was appointed to represent Mr. Pierce in a criminal indictment in the Eastern District of Virginia.

Q Do you know approximately when it was you were appointed to this case?

A Late-October of 1985.

Q Now could you briefly tell the court the nature of the criminal charge in that case?

A Mr. Pierce was charged with a seven-count felony indictment involving illegal use of credit cards at National Airport and it was also alleged that he was part of a conspiracy operating a criminal element, operating with the Black Hebrew Sect. There were related prosecutions in the [3] District of Columbia.

Q Now was there a particular prosecutor you had some dealings with in certain plea negotiations?

A Mr. Stevens.

Q John Stevens, Assistant United States Attorney, here in the District of Columbia?

A Correct.

Q Now could you relate to the court how this progressed as far as the final plea agreement was made?

A We agreed—we reached a plea agreement, Mr. Stevens and myself. We went to court in front of Judge Hilton in the Eastern District on December 5, 1985, I believe. Judge Hilton accepted Mr. Pierce's plea and directed that Mr. Stevens and I reduce the plea agreement to writing. Mr. Stevens wrote me a letter purporting to contain the conditions of the agreement.

We had discussions, a fair amount of discussions, about the contents of the letter. He redrafted an additional

plea agreement, which we signed and filed with the court.

Q All right, sir. Perhaps, I will show you this letter of December 5th—

Mr. WOLL: If I could have this marked exhibit—

MR. STEVENS: Objection, your Honor. The Plea agreement says "Supersedes All Prior Reports."

THE COURT: I think the plea agreement speaks for itself. I have a copy of it in front of me.

[4] MR. WOLL: Well, I think it is important to have some understanding of what Mr. Molster's understanding of what the plea agreement was.

THE COURT: Well, the plea agreement in effect is a contract and it seems to me it has to speak for itself. This is parole evidence. If the plea agreement is not clear, why conceivably, we wouldn't permit parole evidence. The plea agreement, it seems to me, speaks for itself and it is clear on its face.

MR. WOLL: Well, I would argue to the court that this letter of December 5 does set forth the plea agreement. Now it was revised, Your Honor, later on, but—and I'm sure—

THE COURT: I'm talking about the plea agreement that bears the signature of Mr. Molster and Mr. Pierce and Mr. Stevens.

MR. WOLL: Well Your Honor, I was going to ask him if I could show him this plea agreement-letter, not as entering it in this case, but perhaps to refresh his recollection as to what the contents of the December 5th letter is.

THE COURT: That's getting around indirectly what I won't permit you to do directly. That is, I won't permit you to introduce the letter as a part of this proceeding.

MR. WOLL: Very well, Your Honor.

Mr. Molster, do you have any recollection of this letter of December 5, 1985, as far as what is stated?

THE WITNESS: Yes.

[5] MR. WOLL: Well, what is that, sir?

THE COURT: Well, wait a minute. I'm going to sustain an objection to that. You are asking for the contents of the letter and I have indicated the letter is not admissible.

Mr. WOLL: Very well.

After you received the December 5th letter, what happened?

THE WITNESS: Mr. Stevens made some agreement to to provisions that it almost ended up in a final plea agreement.

THE COURT: Well, some time after you had these negotiations with Mr. Stevens, you and your clients discussed the matter and somebody typed up a document, three-page document, entitled "Plea Agreement." Now I take it Mr. Stevens did that, is that correct, Mr. Molster?

THE WITNESS: Yes, Your Honor.

THE COURT: And when you got through, you read it and Mr. Pierce read it?

THE WITNESS: Yes, Your Honor.

THE COURT: And both of you signed it?

THE WITNESS: Yes, Your Honor.

THE COURT: Go ahead, Mr. Woll.

BY MR. WOLL:

Q Now would you tell us what your understanding of the plea agreement was that was reduced to writing, that was signed by you as well as your client?

[6] THE COURT: I will sustain the objection to that. I said the plea agreement speaks for itself.

MR. WOLL: Well, I would like to show him the plea agreement, if I could, Your Honor.

THE COURT: Sure.

MR. WOLL: Could I have that marked as an exhibit?

THE COURT: It may be Defendant's No. 1.

THE DEPUTY CLERK: Defendant's Exhibit No. 1 marked for identification.

(Defendant's Exhibit 1 so marked.)

BY MR. WOLL:

Q Can you identify what is marked as Defendant's Exhibit No. 1 (handing)?

A Yes. This is the plea agreement.

Q And this is the plea agreement that you went over with your client, Mr. Pierce?

A Correct.

Q And you signed this plea agreement?

A Correct.

Q As did Mr. Gregory Pierce; is that correct?

A Correct.

Q All right. Now I'd like to direct your attention to page 2 of the plea agreement, specifically paragraph 3. What was your understanding in reference to that specific provision of the plea agreement?

[7] MR. STEVENS: Objection, Your Honor.

THE COURT: I'll sustain the objection. Mr. Molster's understanding is not controlling. It was written down and was agreed to.

MR. WOLL: Well certainly, Your Honor, if he is going to advise his client as to whether to accept the plea agreement, or not to accept it—

THE COURT: Now he may have a viable motion to vacate his sentence on the ground that the plea agreement was violated, but that would be in the Eastern District of Virginia, and I am aware of that possibility, but we are stuck with the plea agreement as it is written—the plea agreement that was before Judge Robinson when we entered his order on February 27th.

MR. WOLL: Well Your Honor, there're a lot of things that lead up to a plea agreement.

THE COURT: Oh, I don't think there is any doubt about it, but the point is that is the basis for vacating the judgment in Virginia and the sentencing on the ground that the plea agreement has been violated.

Now we are taking the position that we are bound by the plea agreement and we are proceeding from there.

MR. WOLL: Well, first of all, Your Honor, I don't think necessarily that the remedy has to be a withdrawal of the plea, if we can show that was the understanding of the defendant, that he would not have to testify in any matters [8] concerning the Black Hebrew Sect.

THE COURT: If the defendant misunderstood the plea agreement as written, it seems to me that is a basis for going ahead and vacating what happened in Virginia.

MR. WOLL: Well, I would argue that the government is bound because the understanding that this attorney had with Mr. Stevens was that he would not have to testify in any Black Hebrew matter and so they would be bound by the agreement.

THE COURT: I think the government is bound by that agreement and I'm sure Mr. Stevens will argue that the defendant is bound by the plea agreement. But the government is relying on paragraph 3, which presumably the parties had a part in drafting, and doesn't intend to go outside the plea agreement.

MR. WOLL: But I don't think it is clear, the wording of it.

THE COURT: Well, that is a matter that you can argue in Virginia, but we have it in front of us and it seems to me to be perfectly clear.

MR. WOLL: So Your Honor is precluding Mr. Molster's understanding as to the language in paragraph 3?

THE COURT: That's right.

BY MR. WOLL:

Q Now did you receive any subsequent letter from Mr. Stevens in reference to Mr. Pierce's situation?

[9] A Yes, I did.

Q And what was that?

A In December, some time after the plea agreement was entered into, Mr. Stevens sent me a letter inviting Mr. Pierce to testify before the grand jury prior to his sentencing by Judge Hilton. The letter indicated—

THE COURT: What grand jury was that?

THE WITNESS: I believe it was the District of Columbia, Your Honor. I may need to look at the letter to refresh my recollection.

MR. WOLL: Your Honor, may I show him the letter of December 11th?

THE DEPUTY CLERK: Defendant's Exhibit No. 2 marked for identification.

(Defendant's Exhibit 2 so marked.)

BY MR. WOLL:

Q Looking at Defendant's Exhibit No. 2 (handing), can you identify that?

A This is the letter to which I refer.

Q And what was your understanding concerning—

THE COURT: Now this letter, as I understand, had to do with calling upon Mr. Pierce to testify before a grand jury—

MR. WOLL: —inviting him to testify.

THE COURT: —inviting him to testify before a grand jury.

[10] MR. WOLL. That's correct.

Now did you go over, or did you communicate this letter to your client, do you recall?

THE WITNESS: Yes.

By MR. WOLL:

Q And what was decided as far as this invitation to testify, as far as you are concerned?

A It was our understanding that this could only be an invitation to testify as a result of our plea agreement—

MR. STEVENS: Objection, Your Honor. The witness is injecting the inadmissible testimony into an admissible question.

MR. WOLL: Your Honor, I think—

THE COURT: Ask the question again, Mr. Woll, and we'll hear Mr. Molster's answer.

MR. WOLL: I asked him if he discussed the letter with his client and he was answering that, Your Honor.

THE COURT: That he did?

MR. WOLL: Yes.

THE COURT: What is your next question?

MR. WOLL: And what was decided in reference to the letter?

THE WITNESS: Mr. Pierce and I discussed the letter and discussed that the letter could only be an invitation. It could not be a subpoena.

[11] MR. STEVENS: The objection was to what was decided whether he was going to accept it, or not.

THE COURT: That's right. Let's be responsive.

As a result of discussing this matter with Mr. Pierce, what did you tell Mr. Stevens?

THE WITNESS: We declined the invitation to testify before the grand jury.

THE COURT: That is the District of Columbia grand jury?

THE WITNESS: Yes, Your Honor, I believe so.

By MR. WOLL:

Q Now did the letter make mention as to what position the government would take if he declined to testify?

A Yes. The letter indicated that if Mr. Pierce declined to testify, that would be brought to the attention of the sentencing judge. If he agreed to cooperate, that also would be brought to the attention of the sentencing judge.

THE COURT: At the time of sentencing, did Mr. Stevens bring this to the sentencing Judge's attention—

THE WITNESS: Yes.

THE COURT: —The fact that he did not testify?

THE WITNESS: Yes.

THE COURT: And asked that that be considered as a part of the sentencing of the Judge?

THE WITNESS: As I recall, yes.

[12] MR. WOLL: Your Honor, I would ask that Defendant's Exhibit No. 2 be entered into evidence.

THE COURT: It will be received.

(Defendant's Exhibit No. 2 admitted.)

By MR. WOLL:

Q Now as a result of this plea agreement and after the sentencing of Mr. Pierce, what was your understanding in reference to his obligations that he had from that point on to Mr. Stevens?

MR. STEVENS: Objection again, Your Honor.

THE COURT: I will sustain the objection.

MR. WOLL: Well, no further questions.

THE COURT: Do you have any questions, Mr. Stevens?

MR. STEVENS: No, Your Honor.

THE COURT: Thank you, Mr. Molster.

THE WITNESS: Thank you, Your Honor.

(Witness withdrew from the stand.)

MR. WOLL: May we have just a moment, Your Honor?

Your Honor, we have no further evidence to present.

THE COURT: Do you have anything you want to present?

MR. STEVENS: No, Your Honor. We will just reserve our right to argue.

THE COURT: I'd like to ask Mr. Molster a couple of questions. Would you resume the witness stand, Mr. Molster.

(Witness resumed the stand.)

[13] THE COURT: I think you indicated that Mr. Pierce was called to testify before the grand jury and that the so-called lack of cooperation was brought before the sentencing judge at the time of his sentence; is that correct?

THE WITNESS: Yes, Your Honor.

THE COURT: I take it that implicit in that report was the notion that in other ways than those covered by the plea agreement, Mr. Pierce was cooperative with the government?

THE WITNESS: I'm sorry, I didn't hear—

THE COURT: I take it that implicit in the report was the notion that as a part of the plea agreement, Mr. Pierce cooperated with the government, except as precluded by the plea agreement?

THE WITNESS: Your Honor, the terms of the plea agreement, at least in my view, were that Mr. Pierce would not have to cooperate with the government. He cooperated at the plea, itself—

THE COURT: You mean cooperated at the plea? What do you mean by that?

THE WITNESS: The government asked him several questions at the plea to indicate that Mr. Pierce did not have exculpatory evidence against—

THE COURT: That is set out in the plea agreement, itself.

Well thank you, Mr. Molster.

(Witness withdrew from the stand.)

[14] THE COURT: Mr. Pierce, will you step forward, please.

(Witness Pierce approached the lectern.)

THE COURT: Mr. Pierce, you have previously declined to testify before an ongoing grand jury; is that correct?

MR. PIERCE: Yes, I did.

THE COURT: And you have been requested to do so again?

MR. PIERCE: Requested to do so—

THE COURT: I say you have been requested again to appear before the grand jury—or was it only once?

MR. PIERCE: It was only once. I guess, this is another one.

THE COURT: It was only one situation?

MR. PIERCE: Right, that situation—

THE COURT: And you declined at that time to testify?

MR. PIERCE: Yes, I did.

THE COURT: And you are presently refusing to testify?

Mr. PIERCE: Yes, I am.

THE COURT: And you are aware of the fact that you could be found in contempt and sentenced to a term for as long as the life of the grand jury, which I am told is something like ten months, plus any extension of that grand jury?

MR. PIERCE: Yes.

THE COURT: And you are aware that if you do decide to appear before the grand jury, you could purge yourself of [15] contempt and the penalty which attaches to the contempt will be obviated, it will disappear?

MR. PIERCE: Yes, I do.

THE COURT: And I'm going to ask you, finally, do you still persist in refusing to appear before the grand jury?

MR. PIERCE: Yes, I do.

THE COURT: Even though you recognize the penalties that may ensue—and in fact, this penalty will be consecutive to any sentence you have previously received from the Eastern District of Virginia.

MR. PIERCE: Yes, I do.

THE COURT: Well, I think the record should show that paragraph 3 of the plea agreement, which appears on page 2, states that "the government will not call Mr. Pierce as a witness in any of the cases indicted in the District of Columbia involving other members of the alleged criminal operation, operated within the Black Hebrew sect."

That refers to cases that have been indicted and one of those cases is now in the process of trial. The grand jury that Mr. Pierce has been called to appear before is not

one of the cases indicted. There has been no indictment and I think the clear language of the plea agreement—and I'm not asking Mr. Stevens to explain it for the same reason that I wouldn't permit Mr. Woll to explain Mr. Pierce's understanding of it—I think the clear reading of the plea agreement is that it refers [16] to indicted cases and does not exclude grand jury investigations of ongoing matters.

And for that reason, I think that the plea agreement does not cover his grand jury testimony in a non-indicted case and in view of his persistent refusal to testify, why we have no alternative except to hold him in contempt and commit him to custody for the life of the grand jury.

And it is also understood that whatever sentence was imposed in the Eastern District of Virginia will be temporarily halted and will not count as time served, to be served until the commitment under this contempt order is satisfied; and that will be the end of the grand jury, whenever that is, or any extension.

Do you have anything further you want to say, Mr. Woll?

Mr. WOLL: Well, I was prepared to argue the merits of the matter, but Your Honor has already decided—

THE COURT: I think the thing pretty well speaks for itself, Mr. Woll.

MR. WOLL: Thank you, Your Honor.

MR. STEVENS: Would Your Honor like me to prepare the order?

THE COURT: What's that?

Mr. STEVENS: Would Your Honor like me to prepare the order?

[17] THE COURT: Yes, you prepare the order.

MR. STEVENS: I will have it by this afternoon, Your Honor.

(Whereupon, subject proceedings were so concluded at 11:12 a.m.)

* * * *

CERTIFICATE OF REPORTER

The above and foregoing typewritten record is hereby certified by the undersigned as the official transcript of the proceedings in the above-captioned matter.

/s/ Vernell A. Marshall
VERNELL A. MARSHALL
Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 86-0066

IN RE: GRAND JURY PROCEEDINGS

GREGORY PIERCE

[Filed Mar. 10, 1986]

ORDER

Upon Gregory Pierce's refusal to testify before Grand Jury 85-4, and after review of all papers and pleadings in this matter, including oral argument heard March 6, 1986, in connection therewith, the Court finds:

(1) That the United States Attorney for the District of Columbia on February 27, 1986, properly made application for an Order from the Honorable Aubrey E. Robinson, Jr. compelling Gregory Pierce to give testimony to the Grand Jury under the provisions of 18 U.S.C. 6002-6003, and

(2) That the court signed the Order compelling Gregory Pierce to appear and give testimony before the Grand Jury on February 27, 1986, and

(3) That Gregory Pierce refused to comply with the court's Order, claiming that a plea agreement entered into with the United States in the Eastern District of Virginia barred his being subpoenaed as a witness here,

(4) That the plea agreement relied upon by the defendant plainly does not bar the government from call-

ing him to the Grand Jury to investigate matters not already indicted in the District of Columbia, and

(5) That the matters for which his testimony is sought are not those which have already been indicted in the District of Columbia, and

(6) That having heard the ruling of this Court that the plea agreement relied upon would not bar his subpoena, nor serve as an excuse for refusing to obey the Order compelling his testimony, Gregory Pierce, in open court, persisted in his refusal to comply with the compulsion Order of February 27, 1986.

Therefore it is by the Court this 10th day of March, 1986,

ORDERED, that Gregory Pierce is in contempt of Court and is for that reason remanded to the custody of the Attorney General of the United States or his duly authorized delegate pursuant to 28 U.S.C. 1826, for a period of time not to exceed the life of Grand Jury 85-4, or until such time prior to that as Gregory Pierce complies with the Order of the court compelling his testimony, and it is further

ORDERED, that, because the present commitment for civil contempt is intended not to punish but to compel compliance with the court's Order to testify, and to give meaning and coercive impact to the court's contempt powers in the interest of protecting the court's integrity, the execution of any other other sentence now being served by Gregory Pierce shall be held in abeyance during his confinement for contempt.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

Supreme Court, U.S.
FILED
NOV 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-483

In the Supreme Court of the United States

OCTOBER TERM, 1986

GREGORY PIERCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

1918

QUESTIONS PRESENTED

1. Whether petitioner, who was held in contempt for refusing to testify before a grand jury, was deprived of an adequate opportunity to explain the reasons for his recalcitrance.

2. Whether under 28 U.S.C. 1826(b) petitioner is entitled to a credit on his underlying sentence, which was stayed by his contempt citation, for the period in excess of 30 days that the court of appeals took to decide his appeal, where the claim on appeal was ultimately found to be without merit.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Berry, In re, 521 F.2d 179, cert. denied, 423 U.S. 928 9-10
Fula, In re, 672 F.2d 279 9
Grand Jury Investigation (Hartzell), In re, 542 F.2d 166, cert. denied, 429 U.S. 1047 10
Grand Jury Proceedings In re, 776 F.2d 1099 ..... 10, 12
Grand Jury Proceedings (Gravel), In re, 605 F.2d 750 10
Grand Jury Proceedings (Horak), In re, 625 F.2d 767, cert. denied, 449 U.S. 840 9
Grand Jury Proceedings (Smith), In re, 604 F.2d 318 10
Grand Jury Proceedings (Vargas), In re, 727 F.2d 941, cert. denied, 469 U.S. 819 9
Grand Jury Proceedings of August, 1984, In re, 757 F.2d 108, cert. denied, No. 84-1405 (Apr. 15, 1985) 10-11
July 1979 Term Special Grand Jury, In re, 656 F.2d 64 9
Kitchen, In re, 706 F.2d 1266 8
Melickian v. *United States*, 547 F.2d 416, cert. denied, 430 U.S. 986 ..... 5, 9, 11, 12
Rosahn, In re, 671 F.2d 690 ..... 9, 11, 12
United States v. *Doe*, 460 F.2d 328, cert. denied, 411 U.S. 909 10
United States v. *Johnson*, 736 F.2d 358 11

Constitution and statutes: Page

U.S. Const. Amend. V 2
Speedy Trial Act of 1974, 18 U.S.C. 3162 12
18 U.S.C. (Supp. II) 1029(a)(1) 2
18 U.S.C. 6002 2
18 U.S.C. 6003 2
28 U.S.C. 1826 12
28 U.S.C. 1826(b) 5, 9, 11, 12, 13

Miscellaneous:

4 *Williston on Contracts* (3d ed. 1961) 7

In the Supreme Court of the United States

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No. 86-483

GREGORY PIERCE, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The May 16, 1986, opinion of the court of appeals (Pet. App. A3-A8) is unreported. The July 8, 1986, opinion of the court of appeals (Pet. App. A9-A14) is reported at 794 F.2d 749.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1986 (Pet. App. A1-A2), and a petition for rehearing was denied on August 6, 1986 (Pet. App. A15-A16). The petition for a writ of certiorari was filed on September 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a member of the "Black Hebrew" sect, was charged in October 1985 in the Eastern District of Virginia with seven counts relating to the purchase of airline tickets with a counterfeit credit card at Washington National Airport. His court-appointed attorney and the prosecutor negotiated a plea agreement under which petitioner pleaded guilty to a single count of fraudulent use of a counterfeit credit card, in violation of 18 U.S.C. (Supp. II) 1029 (a)(1).[1] As part of the plea, which was entered on December 5, 1985, the government agreed that it would "not call [petitioner] as a witness in any of the cases indicted in the District of Columbia involving other members of the alleged criminal organization operating within the 'Black Hebrew' sect" (Pet. App. A3, A17, A18).

Six days after the plea was entered, the prosecutor wrote to petitioner's attorney inviting petitioner to testify before a grand jury investigating criminal activity by the Black Hebrew sect. Petitioner declined that invitation, despite the prosecutor's offer of use immunity (18 U.S.C. 6002, 6003) and despite his warning that any lack of cooperation on petitioner's part would be made known to the judge at the sentencing on petitioner's plea (Pet. App. A20-A21, A39).

In February 1986, petitioner was summoned to testify before a grand jury investigating the Black Hebrews' alleged criminal activities. Petitioner, represented by another court-appointed attorney, invoked his Fifth Amendment privilege and refused to testify.

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[1] On January 10, 1986, petitioner was sentenced to one year's imprisonment for that offense.

He later was granted use immunity and was ordered to testify, but he still refused to do so, claiming that his plea agreement precluded the government from calling him before the grand jury. Pet App. A22-A23, A45. At a hearing on March 6, 1986, to show cause why petitioner should not be held in contempt, the district court heard evidence about the circumstances of the plea agreement from the attorney who had represented petitioner in connection with the plea (*id.* at A3, A5, A32-A41). The district court declined, however, to allow the attorney to testify about his subjective understanding of the plea agreement, indicating that the written text of the agreement was unambiguous and therefore controlling (*id.* at A5-A6, A36, A40, A43).[2]

After hearing the evidence and examining the written plea agreement, the district court determined that the agreement relieved petitioner from testifying only as to cases in which an indictment had already been returned as of the time of petitioner's guilty plea (Pet. App. A3, A43). Since the grand jury investigation in question plainly did not fall within that category, the court ruled that petitioner's plea agreement did not afford him a basis for refusing to testify before the grand jury. When petitioner persisted in his refusal to testify, the court held him in civil contempt and ordered that he be incarcerated for the life of the grand jury or until he agreed to testify. It further ordered that the sentence imposed in the Eastern District of Virginia be held in abeyance during his confinement for contempt. *Id.* at A42-A43, A45-A46.

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[2] The court also indicated (Pet. App. A43) that the prosecutor likewise would not be asked to give his subjective understanding of the agreement.

2. On March 12, 1986, petitioner filed a notice of appeal from the district court's order, and new counsel was appointed. On May 15, 1986, after full briefing, the court of appeals heard oral argument on the appeal. The following day, the court affirmed the order of the district court in an unpublished memorandum opinion (Pet. App. A3-A8). The court rejected petitioner's argument that the plea agreement was ambiguous, thereby warranting the admission of extrinsic evidence on the parties' intent (*id.* at A4). According to the court (*ibid.*), the agreement made clear that petitioner "was being excused from testimony in 'cases indicted' in a specific jurisdiction, not from grand jury investigations in that jurisdiction." The court further found (*id.* at A6) that the plain language of the agreement was consistent with the proceedings before the sentencing judge in the Eastern District of Virginia. At that time, the prosecutor mentioned petitioner's refusal to cooperate in the District of Columbia grand jury investigation. Neither petitioner nor his attorney stated that petitioner's failure to cooperate was justified by the terms of the agreement. The plain language was also bolstered, in the court's view, by the prosecutor's statement at the sentencing proceeding—with which petitioner agreed—that under the agreement, "the Government does not plan to call [petitioner] to testify in the cases *now indicted* in Washington, D.C." (*id.* at A5 (emphasis added)). Finally, although the district court had not allowed petitioner's prior attorney to testify about his understanding of the plea agreement, the court of appeals received and considered an affidavit from the attorney addressing that issue (*id.* at A6-A7 & n.6). The court concluded, however, that the affidavit actually supported the district

court's ruling, because the affidavit referred to the prosecutor's promise that petitioner would not be compelled to testify in connection with any Black Hebrew "prosecutions," and because prosecutions "do not begin until an indictment has issued" (*id.* at A7).

Since the court of appeals took more than 30 days from the filing of the notice of appeal to resolve the case, the court requested further briefing on whether petitioner should receive credit, pursuant to 28 U.S.C. 1826(b),[3] on his criminal sentence for the 35 days that the appeal consumed beyond the statutory 30-day period. After considering the supplemental briefs, the court held that petitioner was not entitled to credit on his criminal sentence for the period in excess of 30 days (Pet. App. A9-A14). According to the court (*id.* at A11 & n.2, A13), a civil contemnor's remedy is to seek release on bail under 28 U.S.C. 1826(b), which authorizes bail to a contemnor unless his appeal is either "frivolous or taken for delay." In so ruling, the court declined to follow *Melickian* v. *United States*, 547 F.2d 416 (8th Cir.), cert. denied, 430 U.S. 986 (1977), which held that a contemnor should be released on bail if a court of appeals does not meet the 30-day requirement of Section 1826(b), even if the contemnor is unable to show that his appeal is not frivolous or taken for delay (Pet. App. A13-A14).

On October 15, 1986, after the filing of the petition for a writ of certiorari, the district court ordered that

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[3] Section 1826(b) provides, in relevant part, that "[a]ny appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

petitioner discontinue serving any further incarceration relating to the civil contempt order (App., *infra*, 1a). Two days later, the government filed an application for order to show cause, requesting that petitioner be ordered to show cause why he should not be held in criminal contempt for refusing to testify before the grand jury. On November 5, 1986, the district court denied the government's application. In light of the district court's November 5 ruling, the government does not intend to pursue criminal contempt charges against petitioner.

ARGUMENT

1. Petitioner's principal contention (Pet. 9-15) is that he was denied his right to a full hearing on whether he had just cause for refusing to comply with the district court's order that he testify. Specifically, he claims that the district court erred by precluding him from presenting testimony concerning his (and his attorney's) subjective understanding of the plea agreement.

As an initial matter, we note that the circumstances of this case have changed somewhat since the petition for a writ of certiorari was filed. The district court has discharged petitioner from confinement for his civil contempt (App., *infra*, 1a), and the government does not intend to bring criminal contempt charges. Nonetheless, the case is not moot at this time. If petitioner were to prevail in showing that he had just cause for refusing to testify and that the contempt citation was wrongfully issued, he would be entitled to a credit on his criminal sentence for the period he served on the contempt citation, during

which time the underlying criminal sentence was held in abeyance.[4]

On the merits, we submit that the court of appeals' decision is correct. Petitioner's claim that the plea agreement justified his refusal to testify was fully considered by the district court. As the court of appeals noted (Pet. App. A5), the district court heard evidence concerning the background of the plea and studied the text of the agreement. The district court simply ruled that because the language of the written agreement was clear, extrinsic evidence of the parties' subjective understanding of the agreement would not be admitted. Except for its ruling on that issue—a ruling that we submit is correct[5]—the court in no way precluded petitioner from putting on evidence to support his claim that there was just cause for his refusal to testify.[6]

Furthermore, petitioner's claim that he was denied the opportunity to present evidence of his subjective understanding of the plea agreement is particularly

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[4] We have been advised that petitioner is now due to be released on his criminal sentence in May 1987. Petitioner's completion of that sentence would moot both issues in this case.

[5] As the court of appeals noted (Pet. App. A6), "[o]ne party's subjective understanding, whatever it might be, cannot override the unambiguous terms of an agreement, especially one not of Byzantine complexity but which to the contrary is written in plain English and covering only two and one-half pages." See generally 4 *Williston on Contracts* § 601, at 310 (3d ed. 1961).

[6] Notably, once petitioner's prior attorney completed his testimony, the lawyer who represented petitioner at the contempt hearing conferred with petitioner and then rested his evidentiary presentation without calling petitioner or any other witness to the stand (see Pet. App. A40).

unpersuasive in light of the court of appeals' consideration of an affidavit filed by petitioner's prior attorney on that very subject (see Pet. App. A7 & nn. 6-7). As the court of appeals pointed out (*id.* at A7), the affidavit, far from supporting petitioner's refusal to testify, was in fact "consistent with the plain language of the agreement itself." [7]

Petitioner's contention (Pet. 15 n.10) that the court of appeals' decision somehow conflicts with decisions of other circuits that have recognized a contemnor's right to a full hearing is without merit. The court's memorandum opinion in no way suggests that a contemnor can be denied a fair hearing. Similarly, the cases cited by petitioner (*ibid.*) do not hold that a district court, in conducting a hearing, must permit the defense to introduce evidence that is factually or legally irrelevant or otherwise inadmissible.[8]

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[7] Even aside from the unambiguous language of the agreement, the asserted propriety of petitioner's refusal to testify was belied by the events at his sentencing hearing. As the court of appeals noted (Pet. App. A6), the prosecutor at sentencing brought to the court's attention petitioner's refusal to cooperate in the District of Columbia grand jury proceedings, yet "[n]ot one word was interposed by [petitioner] or his trial counsel that the former's failure to cooperate was justified by the terms of the plea agreement." Furthermore, when the prosecutor explained to the sentencing court the terms of the agreement—that " 'the Government does not plan to call [petitioner] to testify *in the cases now indicted* in Washington, D.C.' " (*id.* at A5 (emphasis added))—petitioner indicated his agreement with the prosecutor's representation (*ibid.*).

[8] Indeed, in *In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983), one of the principal authorities relied upon by petitioner, the Second Circuit made clear (*id.* at 1273) that if a district court determines, based on an offer of proof, that a witness's testimony would not be relevant, it can preclude the witness from testifying.

At most, the issue is whether the district court, in construing the plea agreement and excluding extrinsic evidence, properly applied common law principles of contract law, a question plainly inappropriate for review by this Court.

2. Petitioner also contends (Pet. App. 16-20) that under 28 U.S.C. 1826(b) the court of appeals should have given him credit on his criminal sentence for the period in excess of 30 days that it took the court of appeals to decide his appeal from the civil contempt citation. The 30-day period, however, was designed to protect contemnors with meritorious claims, and both courts below properly determined that petitioner's claim was not meritorious. Accordingly, the court of appeals correctly ruled that petitioner was not entitled to a credit on his criminal sentence.

a. As petitioner notes (Pet. 16-19), there is a conflict among the circuits on the interpretation of 28 U.S.C. 1826(b). In the Second and Eighth Circuits, a confined contemnor is released on bail if the appeal cannot be decided within the 30-day period. See, *e.g.*, *In re Fula*, 672 F.2d 279, 282-283 (2d Cir. 1982); *In re Rosahn*, 671 F.2d 690, 693-694 (2d Cir. 1982); *In re Grand Jury Proceedings* (*Horak*), 625 F.2d 767, 768 (8th Cir.), cert. denied, 449 U.S. 840 (1980); *Melickian* v. *United States*, 547 F.2d at 417-420; see also *In re July 1979 Term Special Grand Jury*, 656 F.2d 64, 66 & n.3 (4th Cir. 1981). The Tenth Circuit has apparently resolved its appeals within 30 days but has stated in dictum that the 30-day period is jurisdictional and may not be extended. See *In re Grand Jury Proceedings* (*Vargas*), 727 F.2d 941, 942-943 n.1 (10th Cir.), cert. denied, 469 U.S. 819 (1984); *In re Berry*,

521 F.2d 179, 181 (10th Cir.), cert. denied, 423 U.S. 928 (1975). The Fifth Circuit has simply extended the 30-day period by order if the case cannot be decided in a timely fashion. See, *e.g.*, *In re Grand Jury Proceedings* (*Gravel*), 605 F.2d 750, 751-752 (5th Cir. 1979); *In re Grand Jury Proceedings* (*Smith*), 604 F.2d 318, 319 (5th Cir. 1979). The First and Third Circuits have extended the period, apparently without issuing orders. See, *e.g.*, *United States* v. *Doe*, 460 F.2d 328, 332 n.3 (1st Cir. 1972), cert. denied, 411 U.S. 909 (1973); *In re Grand Jury Investigation* (*Hartzell*), 542 F.2d. 166 (3d Cir. 1976), cert. denied, 429 U.S. 1047 (1977). The Seventh Circuit recently treated the 30-day period as commencing when the contemnor files his brief on appeal, not when the notice of appeal is filed. *In re Grand Jury Proceedings of August, 1984*, 757 F.2d 108, 110-112 n.1 (1984), cert. denied, No. 84-1405 (Apr. 15, 1985). And the District of Columbia Circuit in the present case, in an approach that is functionally equivalent to that taken in the First, Third, and Fifth Circuits, has rejected the contention that a contemnor must be released on bail if his appeal is not resolved within 30 days.

Notwithstanding these disparate approaches, we believe that the issue raised here is unimportant and that review by this Court is not necessary. The conflict identified by petitioner has existed since the mid-1970s (see *Gravel*, 605 F.2d at 752 n.1) and we have seen no indication that Congress's intent has been contravened or that any unfair hardship has resulted. The reason is clear: Congress's purpose in enacting 28 U.S.C. 1826(b) was to protect *meritorious* contemnors. See, *e.g.*, *In re Grand Jury Proceedings*, 776 F.2d 1099, 1102 (2d Cir. 1985); *In re*

Grand Jury Proceedings of August, 1984, 757 F.2d at 111 n.1; *United States* v. *Johnson*, 736 F.2d 358, 361-362 n.5 (6th Cir. 1984); *In re Rosahn*, 671 F.2d at 694 (reviewing legislative history); *Melickian*, 547 F.2d at 417, 419. Yet the conflict cited by petitioner has no effect whatsoever on *meritorious* contemnors, because in all but frivolous cases or cases taken for delay, the contemnor is entitled to bail under 28 U.S.C. 1826(b).[9] Furthermore, as the government conceded below, if a contemnor is incarcerated on other charges, and if he prevails on his appeal, he is entitled to credit on his criminal sentence for all the time he has served since the contempt order was entered. See Gov't C.A. Supp. Br. 9; see also *Johnson*, 736 F.2d at 362 n.5 ("[I]f it is determined that [the defendant] was erroneously held in contempt, the time he has served under the contempt judgment can be credited toward his bank robbery sentence"). Thus, assuming the contemnor avails himself of the statutory bail remedy, the only person whose case would be affected by the different circuit approaches is one whose appeal is frivolous or taken solely for delay.[10] And there is nothing unfair or unjust if

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[9] As the court of appeals in the present case noted (Pet. App. A11 n.2), even a contemnor imprisoned on unrelated criminal charges can seek bail on the contempt matter and thereby resume serving his criminal sentence.

[10] Petitioner does not view his appeal to have been frivolous or taken for delay, but he did not seek bail on the contempt matter so that he could continue serving his criminal sentence. While he asserts that the bail remedy in that context was not logical (Pet. 18), we agree with the court of appeals (Pet. App. A11 & n.2) that even if the approach is "atypical," there is no reason why a contemnor who is incarcerated on an unrelated conviction cannot seek bail and thereby have his criminal sentence continue to run. Moreover, petitioner could

such a person does not obtain an automatic release after 30 days if his frivolous or dilatory appeal has not been decided.[11]

b. On the merits, we submit that the court of appeals' decision is correct. As the court correctly noted (Pet. App. A10-A11), Congress provided no remedy for the violation of 28 U.S.C. 1826(b), even though it did so with respect to other statutory time limits on judicial proceedings, such as the Speedy Trial Act of 1974 (18 U.S.C. 3162). This factor strongly suggests that Congress intended to provide no remedy for violation of the 30-day rule. Furthermore, as the court observed (Pet. App. A11, A12-A13), Congress's concern in passing 28 U.S.C. 1826(b) was to protect meritorious contemnors, and "[t]he liberal standard for granting bail ensures that no contemnor will languish in custody pending appeal except one who cannot show that the appeal is not frivolous or

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have sought mandamus to require the court to decide the case in a timely manner (see Pet. App. A10-A11 n.1, A13-A14 n.3). In any event, it is now clear—and hence, no longer illogical—that a contemnor serving a sentence whose appeal is not frivolous or taken for delay has a means to avoid having his sentence stayed during the pendency of the appeal. Thus, the rule adopted in the District of Columbia Circuit works no hardship on any contemnor filing a nonfrivolous appeal.

[11] We note that the courts have endeavored to resolve appeals under 28 U.S.C. 1826 as promptly as possible. The Second Circuit, for example, has instructed the parties to provide special notice to the court if an appeal falls within 28 U.S.C. 1826(b) so that the court can set an expedited briefing schedule. See *In re Grand Jury Proceedings*, 776 F.2d at 1102 & n.1; *In re Rosahn*, 671 F.2d at 694 n.1. See also *Melickian*, 547 F.2d at 418 & nn. 1-5 (citing several cases in which appeals have been disposed of within 30 days).

taken for delay" (Pet. App. A11 (footnote omitted)). In short, the court of appeals correctly construed Section 1826(b) in refusing to credit petitioner's underlying sentence for the period in excess of 30 days that was needed to decide the appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

LOUIS M. FISCHER
Attorney

NOVEMBER 1986

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 86-66

IN RE: GRAND JURY PROCEEDINGS GREGORY PIERCE

[Filed Oct. 15, 1986]

ORDER

Upon consideration of the request for discharge from confinement filed on behalf of Gregory Pierce, the government's response thereto and the entire record herein, it is by the court this 15th day of October, 1986,

ORDERED that the defendant Gregory Pierce discontinue serving any further incarceration relating to the contempt order issued by this court on March 10, 1986.

/s/ J. H. Pratt
JOHN H. PRATT
United States District Judge

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Supreme Court, U.S.
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No. 86-483

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GREGORY PIERCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF IN SUPPORT OF PETITION

THOMAS D. YANNUCCI
(Counsel of Record)
JOHN M. WALKER
RONALD R. ROSS
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioner Gregory Pierce

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. THIS COURT SHOULD DETERMINE WHETHER COMMON LAW CONTRACT PRINCIPLES MAY OVERRIDE A CITIZEN'S STATUTORY AND CONSTITUTIONAL RIGHT TO A FULL AND EFFECTIVE OPPORTUNITY TO EXPLAIN THE REASONS FOR DECLINING TO TESTIFY	2
II. THE ADMITTED CONFLICT AMONG THE COURTS OF APPEALS AS TO THE PROPER APPLICATION OF THE THIRTY-DAY RULE IN 28 U.S.C. § 1826(b) RAISES A SUBSTANTIAL ISSUE WHICH SHOULD BE RESOLVED BY THE COURT	5
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	Page
American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490 (1981)	7
Cooke v. United States, 267 U.S. 517 (1925)	4, 5
Equal Employment Opportunity Commission v. Shell Oil Co., 466 U.S. 54 (1984)	7
Harris v. United States, 382 U.S. 162 (1965)	4
Ingraham v. Wright, 430 U.S. 651 (1977)	4
In re Oliver, 333 U.S. 257 (1948)	4
Reiter v. Sonotone Corp., 442 U.S. 330 (1979)	7
Schall v. Martin, 467 U.S. 253 (1984)	4
United States v. Alter, 482 F.2d 1016 (9th Cir. 1973)	4
United States v. Gravel, 605 F.2d 750 (5th Cir. 1979)	5
STATUTES:	
28 U.S.C. § 1826	*passim*
MISCELLANEOUS:	
3 Corbin on Contracts § 536 (1960)	3

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REPLY BRIEF IN SUPPORT OF PETITION

As shown in more detail below, the government's Opposition is more notable for what it concedes than for what it disputes on each of the two, independent issues which Petitioner maintains merit review by this Court. As to the first issue of the adequacy of the hearing by the district court, the government admits that the district court relied solely on the parol evidence rule—a common law principle designed for use in commercial contract cases—to truncate the Petitioner's statutory and Due Process right to prove that he had "just cause" under 28 U.S.C. § 1826(a) for declining to testify. This ruling not only denied Petitioner a *meaningful* opportunity to present his *defense* to the civil contempt charge, but also evidence which, even if sufficient to constitute a defense, would have gone to mitigating the severity of punishment. This Court long ago established that an

accused contemnor always should be heard for the separate purpose of mitigation. (Pet. at 12-13.)

Regarding the second issue raised in the Petition, the mandate in § 1826(b) that "[a]ny appeal" brought under it must be disposed of within thirty days, the government agrees that "there is conflict among the circuits" on how to properly interpret this language. (Opp. at 9.) Unable to deny its existence, the government is forced to argue that this conflict "is unimportant . . . ." (*Id.* at 10.) In fact, these differing interpretations mean that individuals will be subject to varying periods of confinement while they appeal a finding of contempt. Not only is it axiomatic that issues pertaining to personal confinement are always "important" in our judicial system, the fact that Congress has seen fit to address this issue expressly by statute itself rebuts the government's claim that the issue is "unimportant."

I. THIS COURT SHOULD DETERMINE WHETHER COMMON LAW CONTRACT PRINCIPLES MAY OVERRIDE A CITIZEN'S STATUTORY AND CONSTITUTIONAL RIGHT TO A FULL AND EFFECTIVE OPPORTUNITY TO EXPLAIN THE REASONS FOR DECLINING TO TESTIFY

The government nowhere disputes that Petitioner Pierce was entitled here to a full and fair hearing covering all important issues.[1] Instead, the government contends that Mr. Pierce's grounds for not testifying were

[1] The fact that the Court of Appeals "consider[ed]" an affidavit by Petitioner's attorney (Opp. at 8)—filed only as part of the *appellate* record—is hardly the same as a full and "vigorous debate" on the issues at the trial level. If that were the case, then every hearing required by due process could be eliminated through filing affidavits and appellate courts would essentially become triers of fact. Moreover, Petitioner continues to find ironic the government's use of certain selected extrinsic evidence in seeking affirmance on appeal after it successfully moved to preclude all extrinsic evidence proffered by Mr. Pierce below.

"fully considered" by the district court. (Opp. at 7.) This simply misstates the record. The district court considered only the written plea agreement while—at the government's urging—it expressly excluded any testimony concerning the meaning of the disputed provision in the plea agreement or any representations made to Pierce concerning whether he would have grounds for not testifying in future cases.[2] This result—even if based on a correct statement of contract principles, which Petitioner still maintains it is not[3]—exalts a principle of contract interpretation above an individual's statutory and Due Process right to an "uninhibited adversary hearing," and is a sharp break from the standard established by this

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[2] This ruling directly contradicted the district court's own prior observation that, if Mr. Pierce was going to be subject to civil contempt, then "certainly he ought to be present to present his side of it." (Pet. App. A27.) However, when Mr. Woll, Petitioner's attorney at the subsequent hearing, attempted to develop the background of the plea agreement, the Court cut off this entire line of inquiry by stating: "[n]ow we are taking the position that we are bound by the plea agreement and we are proceeding from there." (Pet. App. A36.)

[3] Not only is the disputed provision in the plea agreement certainly ambiguous, the better reasoned, increasingly adopted approach is to permit extrinsic evidence in all cases—an approach that is all the more appropriate when a citizen's liberty is at stake. *See generally* 3 Corbin on Contracts § 536 (1960):

> [I]t can hardly be insisted on too often or too vigorously that language at its best is always a defective and uncertain instrument, that words do not define themselves, that terms and sentences in a contract . . . seldom . . . convey one identical meaning to the two contracting parties or to third persons. Therefore, it is invariably necessary, before a court can give any meaning to the words of a contract and can select one meaning rather than other possible ones as the basis for the determination of rights and other legal effects, that extrinsic evidence shall be heard to make the court aware of the "surrounding circumstances," including the persons, objects and the events to which the words can be applied and which caused the words to be used.

Court and several lower courts.[4] Put differently, this case is not, as the government suggests, a simple contract dispute between two parties, but a contempt proceeding brought by the U.S. government under a federal statute that resulted in the confinement of the Petitioner after his proffered testimony on the key issue in the case was disallowed. As such, it clearly raises substantial issues worthy of review by this Court.[5]

Finally, even if Petitioner's position regarding his reasons for not testifying would not have constituted a cognizable *defense* to a contempt charge, this Court has held that the right to a full and fair hearing also exists to offer the accused an opportunity to show "extenuation

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[4] As noted in the Petition (at 10), this Court time and again has held that an accused contemnor must "have a reasonable opportunity" to answer contempt charges against him so that he may "meet them by way of defense or explanation" (*In re Oliver*, 333 U.S. 257, 275 (1948)), and that "[i]f justice is to be done, a sentencing judge should know all the facts . . ." (*Harris* v. *United States*, 382 U.S. 162, 166-67 (1965)). Taking the lead in applying these precepts from criminal contempt to the civil contempt statute, 28 U.S.C. § 1826, the Ninth Circuit first held in *United States* v. *Alter*, 482 F.2d 1016, 1024 (9th Cir. 1973) that the " 'uninhibited adversary hearing' recognized by *Harris*" as essential to contempt proceedings "means more than a silhouette of justice; it requires that judicial determinations affecting the freedom of the individual be openly arrived at after full, fair, and vigorous debate on both sides of all substantial issues."

[5] *See Ingraham* v. *Wright*, 430 U.S. 651, 673-74 (1977) (holding that the "contours of this historic liberty interest in the context of our federal system . . . always have been thought to encompass freedom from bodily restraint and punishment" and that it is "[f]undamental that the state cannot hold and physically punish an individual except in accordance with due process of law"). Or, as Justice Marshall, joined by Justices Brennan and Stevens, reminded recently: "If the 'liberty' protected by the Due Process Clause means anything, it means freedom from physical restraint. [Citations]. Only a very important government interest can justify deprivation of liberty in this basic sense." *Schall* v. *Martin*, 467 U.S. 253, 104 S.Ct. 2403, 2423 (1984) (dissenting opinion).

of the offense and mitigation of the penalty imposed . . . ." *Cooke* v. *United States*, 267 U.S. 517, 537 (1925). *See also United States* v. *Gravel*, 605 F.2d 750, 752 (5th Cir. 1979) (per curiam). Thus, even if the district court was correct that under contract principles Pierce had no "defense" to a charge of contempt, its ruling also denied Pierce any opportunity to establish that his punishment should be mitigated. The government nowhere even addresses this troubling aspect of the ruling below, let alone demonstrates that the long-settled right of an accused contemnor to provide evidence on "mitigation" should now be eliminated under a statute that is being increasingly used.

II. THE ADMITTED CONFLICT AMONG THE COURTS OF APPEALS AS TO THE PROPER APPLICATION OF THE THIRTY-DAY RULE IN 28 U.S.C. § 1826(b) RAISES A SUBSTANTIAL ISSUE WHICH SHOULD BE RESOLVED BY THE COURT

As noted at the outset, the government also admits in its Opposition that "there is a conflict among the circuits on the interpretation of 28 U.S.C. 1826(b)" relating to the consequences when a court of appeals fails to decide an appeal within the thirty days mandated by the civil contempt statute. (Opp. at 9.) The government then details for more than a page just how fractured the interpretation of § 1826(b) has recently become, explaining that the Second and Eighth Circuits view the thirty-day period as mandating release if the appeal is not decided within that time; the Tenth Circuit says courts lose jurisdiction entirely at the end of thirty days; the Fifth Circuit expressly extends the time once thirty days have run; the First and Third Circuits "apparently" surreptitiously use the same approach as the Fifth Circuit; the Seventh Circuit has extended the thirty days by measuring the time from when the contemnor files

his brief and not, as the statute says, "from the filing of such appeal"; and now the District of Columbia Circuit has created an approach of its own which the government characterizes as "functionally equivalent" to that taken by the First, Third, and Fifth Circuits. (Opp. at 9-10.)

The government would excuse these widely disparate holdings by arguing, first, that conflicting interpretations of § 1826(b) have "existed since the mid-1970s . . . ." (Opp. at 10.) Yet, the burgeoning caselaw which the government itself cites shows that these conflicts have rapidly expanded since 1982, and the D.C. Circuit's 1986 opinion here has now *expressly*—in contrast to any previous so-called "functionally equivalent" decisions—sharply drawn the conflict among the courts of appeals. Moreover, and as pointed out in the Petition (at 1), commentators have noted the "dramatic increase" in the use of the civil contempt sanction, and thus this conflict will have an increasing, substantial effect.

The government argues, second, that this admitted conflict is "unimportant" (Opp. at 10), adopting the Court of Appeals' circular analysis that the thirty-day limit in the *second* sentence of § 1826(b) was "apparently" intended to protect only contemnors with "substantial grounds for appeal" (Pet. App. A13) because the right to bail afforded by the *first* sentence of § 1826(b) provides that contemnors with meritorious appeals will be released. (Opp. at 12-13.) As an initial matter, issues of imprisonment are always "important" in our system of justice, as already noted. (*See supra* p. 4.) In any event, the government's interpretation of the thirty-day limit renders the second sentence of § 1826(b) wholly nugatory. Congress obviously placed the second sentence in § 1826(b) for a reason, and its specific command that "[*a*]*ny* appeal . . . shall be disposed of as soon as practicable, *but not later than* thirty days from the filing of such appeal" (emphasis supplied) thus should not be

rendered nugatory by the different relief offered by the separate bail provision of § 1826(b). As this Court has observed in a similar context:

> We cannot believe that Congress intended the general terms of § 3(8) to countermand the specific feasibility requirement of § 6(b)(5). We decline to render Congress' decision to include a feasibility requirement nugatory, thereby offending the well-settled rule that all parts of a statute, if possible, are to be given effect.

American Textile Manufacturers Institute, Inc. v. *Donovan*, 452 U.S. 490, 513 (1981) (citations omitted). *See also Equal Employment Opportunity Commission* v. *Shell Oil Co.*, 466 U.S. 54, 72 (1984) (rejecting interpretation which "would render nugatory the statutory limitation" of the law at issue); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used").

Finally, the government's reliance on the Speedy Trial Act is misplaced (Opp. at 12), since it only suggests that Congress favors release once a prescribed period of time for deciding an issue has run. Certainly the interpretation of § 1826(b) provided by the Second and Eighth Circuits, whereby alleged contemnors are released pending disposition of their appeals once thirty days have elapsed, is more consistent with the Speedy Trial Act than is the District of Columbia Circuit's reading that results in there being no significance whatsoever to exceeding the express thirty day period prescribed by Congress. Moreover, it is clear that the protection of the Speedy Trial Act applies in all cases *regardless* of the likely guilt of an individual, which is in sharp contrast to the D.C. Circuit's bald conclusion that unsuccessful appellants are not entitled to the benefit of the thirty-day limit of § 1826(b).

CONCLUSION

Petitioner is mindful that the views of the Solicitor General are often given considerable weight in deciding whether a case warrants the grant of certiorari. But that should not be the case when the Solicitor General speaks as a litigant. Moreover, the government's Opposition here seeks to demonstrate only that the district court's decision was correct. While Petitioner has himself demonstrated that there are substantial grounds for overturning the decisions below, the critical issue at this juncture is whether this Court should undertake to review those decisions. On that issue the government's Opposition only supports a grant of certiorari because it freely admits that the case "is not moot" (Opp. at 6), that there is a "conflict among the circuits" (Opp. at 9), and that the district court relied on the parol evidence rule to exclude the live testimony proffered by Petitioner concerning why he declined to testify (Opp. at 8). Given these concessions and the fact that the case presents issues of personal confinement under an increasingly used federal statute, this case clearly warrants review by this Court.

Respectfully submitted,

THOMAS D. YANNUCCI
(Counsel of Record)
JOHN M. WALKER
RONALD R. ROSS
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioner
Gregory Pierce

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